

# ARTICLE

## THERE IS A LOT TO BE REPAIRED BEFORE WE GET TO REPARATIONS: A CRITIQUE OF THE UNDERLYING ISSUES OF RACE THAT IMPACT THE FATE OF AFRICAN AMERICAN REPARATIONS

BY ART ALCAUSIN HALL\*

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\* Director of Academic Excellence and Adjunct Professor of Law, St. Mary's University School of Law. A.B., Harvard University; J.D./M.B.A., Texas Tech University; L.L.M., University of Wales at Aberystwyth (United Kingdom). Thank you, first, to God. Then, thank you to my beautiful wife, Stephanie, my parents, Archie and Claire, and my brother, Robert-Teofilo (R-T), for their love and support during this project. Also, thank you to Prof. Thomas E. Baker, former Professor of Law at Texas Tech University School of Law and present James Madison Chair in Constitutional Law and Director of the Constitutional Resource Center at Drake University School of Law, for his advice and direction in the original version of this project. Finally, thank you to Dean Bill Piatt for his support beginning as a mentor while at Texas Tech University School of Law and continuing through our relationship today at St. Mary's University School of Law, to student Keisha David for encouraging me to submit this project, to my student editors, Emma O. Guzmán and Julie Linares-Fierro, and to *The Scholar: St. Mary's Law Review on Minority Issues* for its role, meaning, and voice for "minority" issues. I do this piece in memory of my late great grandmother, Lorenza Abelon, and my late grandparents, Robert and Cambra Hall and Teofilo and Leonora Alcausin.

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*"You don't simply say 'I'm sorry' to a man you've robbed. . . . You return what you stole or your apology takes on a hollow ring."*<sup>1</sup>

*History cannot be undone; anything we do now must inevitably be an expression of regret and an affirmation of our better values as a nation, not an accounting which balances or erases. . . . That is now beyond anyone's power.*<sup>2</sup>

## I. INTRODUCTION

I am a 1970s baby – born after the Civil Rights Movement, but yet an intended beneficiary of it. As with many post-Civil Rights Movement

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1. Rhonda V. Magee, Note, *The Master's Tools, From the Bottom Up: Responses to African-American Reparations Theory in Mainstream and Outsider Remedies Discourse*, 79 VA. L. REV. 863, 884 (1993) (quoting Dr. Ernest Campbell, minister of New York's Riverside Church, who wrote in response to James Forman's May 4, 1969, request for reparations at the church).

2. COMMISSION ON WARTIME RELOCATION AND INTERNMENT OF CIVILIANS, PERSONAL JUSTICE DENIED, PART TWO: RECOMMENDATIONS 6 (1983) [hereinafter COMMISSION ON WARTIME RELOCATION].

children, I grew up revering many of the participants and accomplishments of the Civil Rights Movement era. In fact, my childhood hero was the late Dr. Martin Luther King, Jr. – much of who I am today is because of his posthumous inspiration.

While much change has occurred since the Civil Rights Movement, it is discouraging to see the vast amount of change that still remains to be made. The benefits sought by the Civil Rights Movement have not fully materialized, generating frustration, tension, doubt, and distrust in many young African Americans.<sup>3</sup>

The continuing frustration experienced by today's African American youth originated in a long history of discrimination and oppression. We opened the Twentieth century in the wake of the development of Black Codes<sup>4</sup> and Jim Crow laws<sup>5</sup> aimed to counteract<sup>6</sup> Abraham Lincoln's signing of the Emancipation Proclamation in 1863.<sup>7</sup> Lynchings were still a common occurrence at the beginning of the Twentieth century,<sup>8</sup> as well as poll taxes, literacy tests, and property requirements for voting.<sup>9</sup> In addition, in its 1896 "separate but equal" distinction in *Plessy v. Ferguson*,<sup>10</sup> the U.S. Supreme Court determined that social segregation could still exist without depriving any race of equal conditions.<sup>11</sup> In 1903, W.E.B. DuBois<sup>12</sup> highlighted the role of separation as the race issue of the century.

3. In fact, many African American youth have revived a fervor for the present day application of many of the principles expressed by 1960s Nation of Islam national spokesperson Malcolm X and other more militant leaders. This was particularly evidenced by the rise in the number of African American youth wearing Malcolm X T-shirts and "X" caps and that quote Malcolm X and other African American leaders. See Jeanne Albanese, *10 Years and Counting: We Take a Look Back at a Decade of HJ Magazine Series: Best of HJ Magazine*, SYRACUSE HERALD-J., Oct. 7, 1999, at 12; Malcolm J. Venable, *Hip-Hop's a Style that Wears Diversity on Its Sleeve*, RICHMOND TIMES-DISPATCH, Aug. 1, 1999, at G3.

4. Black Codes were state-enacted laws designed to guarantee white supremacy in the new era of the freed Black slave. See RICHARD N. CURRENT ET AL., *AMERICAN HISTORY: A SURVEY* 441 (7th ed. 1987).

5. Jim Crow laws were also state-enacted statutes aimed at ensuring segregation of the races. See *id.* at 475.

6. See generally *id.* (explaining that Black Codes and Jim Crow laws were enacted in the North to maintain white supremacy).

7. See *id.* at 410.

8. See *id.* at 476.

9. These limitations were designed to limit franchise opportunities for African Americans. See *id.* at 474.

10. *Plessy v. Ferguson*, 163 U.S. 537 (1896).

11. *Id.* at 551-52.

12. W.E.B. DuBois was a radical and controversial African American leader during the late 1800s and early 1900s, utilizing his intellect and voice as tools to reform. See CURRENT, *supra* note 4, at 476-77. In the late 1800s, he became the first African American to earn a doctorate from Harvard University and was one of the founders of the National Association for the Advancement of Colored People (NAACP) in 1909. See *id.*

In his book *The Souls of Black Folk*, DuBois wrote, "The problem of the twentieth century is the problem of the color-line, – the relation of the darker to the lighter races of men."<sup>13</sup>

As we enter the Twenty-first century, race threatens to grossly infect this new century as well. The closing decade of the Twentieth century is littered with evidence of America's lingering inability to come to grips with the issue of race, particularly with regard to African Americans, arguably the United States' most egregious past and present example of racism, discrimination, and oppression.

The last decade of the Twentieth century saw several clear examples of America's continuing difficulty in dealing with issues of race. Underlying issues of race surfaced during the Rodney King incident,<sup>14</sup> the Los Angeles riots after meager punishments were given to the police officers who beat King,<sup>15</sup> the O.J. Simpson trial,<sup>16</sup> and the dragging death of James

13. W.E.B. DuBois, *THE SOULS OF BLACK FOLK* 10 (1903).

14. Rodney King, an African American, was videotaped being severely beaten by nine Los Angeles Police Department Officers, all of whom were white, on March 3, 1991. See Karl Vick, *Another Acquittal Would Be No Surprise*, ST. PETERSBURG TIMES, Aug. 6, 1992, at 1A. King received 56 blows and numerous kicks by the police officers and was at all points in the video, on all fours, on his back, on his knees, or on his stomach. See Roger Parloff, *Did the King Jury Make the Right Legal Decision?*, SEATTLE TIMES, May 31, 1992, at A14. King's leg and facial bones were broken during the beating. See *Four L.A. Officer's Acquitted; 1 Dead in Street Violence*, TULSA WORLD, Apr. 30, 1992, at A1; Richard Lacayo, *Anatomy of an Acquittal*, TIME, May 11, 1992, at 30.

15. Only two officers involved in the beating of King were sentenced on April 28, 1993, while the others were acquitted, resulting in riots in Los Angeles. See *Charges Dropped on Eve of Riot Anniversary*, LAS VEGAS REV. L.J., Apr. 29, 1993, at 2C. In the federal court decision regarding civil rights violations, District Judge John Davies elected to give Officer Laurence Powell and Sergeant Stacey Koon two and a half years in prison and two years probation, of the seven to nine years in prison requested by the prosecutor for Powell and the nine to 10 years in prison requested for Koon. See *id.*

In response to the verdicts and riot, Armstrong Williams, an African American conservative and employee of a D.C.-based public-relations firm, stated,

A few weeks ago I would have told black high school students there was a justice system that would protect them. After the King verdict I cannot tell them that they're not being discriminated against because they're black. I can't tell them that anymore because I don't believe it anymore. It's horribly painful. It makes me want to weep. How can I as an African-American conservative tell kids to "stop harping on racism" and, "if you work you'll succeed"? Everything I've ever said and been working for has been shattered in that verdict. For a juror to say that the baton wasn't even hitting. You know what that's like? It's like the crazy people saying the Holocaust never happened.

... I can understand why a lot of these black kids feel the way they do, that the legal system is not designed for them and nothing will ever change that, not when you can see that videotape like I did.

Armstrong Williams, *Race: Our Dilemma Still*, NEWSWEEK, May 11, 1992, at 44, 45.

Byrd in Jasper, Texas.<sup>17</sup> When two of the white supremacists in the James Byrd trials were given death sentences, it marked the first times in Texas history<sup>18</sup> that white killers of an African American were given the ultimate penalty.<sup>19</sup>

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Another individual reacted, "Today, I know that I am not an American. Today, I know that I am a black man, living at the margin of a place called America. . . . Damn you, America! Once more, you have lied to me!" Jill Abramson, *Rodney King Verdict: Aftermath*, WALL ST. J., May 1, 1992, at A1 (quoting Henry Johnson's poem, *Damn You America*).

16. The O.J. Simpson trial occurred after Simpson's wife was found murdered on June 12, 1994. See *U.S. Hall of Fame Football Star Interviewed in Death of Ex-Wife*, Agence Fr.-Presse, June 14, 1994, page unavailable online, available in 1994 WL 9550491. During the trial, which ended October 3, 1995, Officer Mark Fuhrman, the officer in charge and the first to arrive on the crime scene, revealed the racism that infests many police departments, in particular the Los Angeles Police Department. See *Darden Dismisses Pace as a Major Factor in Simpson Verdict; Prosecutor Says Domestic Violence Key to Jury's Decision; Defense Attorney Cochran Disagrees*, AUSTIN AMERICAN-STATESMAN, Oct. 30, 1995, at A9; *Law Enforcement Agencies at Odds Federal Inquiry Into Fuhrman's Tapes Worries LAPD Officials*, THE DALLAS MORNING NEWS, Oct. 30, 1995, at 4A. Among other evidence, Fuhrman's testimony included audiotaped extensive use of the term "nigger" when referring condescendingly to African Americans, despite his earlier claims of denial of the use of such terminology. See *A PR Man on the Spot: Max Clifford Online*, THE GUARDIAN (LONDON), Nov. 24, 1999, available in WL 25747488. Fuhrman is said to have stated, "The only good nigger is a dead nigger. If we don't find evidence, we plant it." *Id.*

17. On June 7, 1998, a 49 year-old African American man, James Byrd, was on his way home at night. See Roy Bragg, *Jurors Hear Note Contents; Jasper DA Calls Brewer's Letter a Confession to Dragging Death*, SAN ANTONIO EXPRESS-NEWS, Sept. 14, 1999, at 1A. He was picked up by three young white men - John William King (24), Lawrence Russell Brewer (31), and Shawn Allen Berry (23). See *Third Jasper, Tx, Dragging Death Defendant Sentenced to Life in Prison*, JET, Dec. 6, 1999, at 13, 13. Byrd was taken into a forest, beaten, chained at the ankles, and dragged to death behind the pickup truck for approximately two miles. Byrd's head, right shoulder, and right arm were torn off during the dragging death. See Bragg, *supra*; Maro Robbins, *3rd Jasper Defendant Receives Life in Prison*, SAN ANTONIO EXPRESS-NEWS, Nov. 19, 1999, at 1A. Lawrence Brewer wrote in a July 15, 1998, letter from his jail cell to a friend in his racist gang, "[N]o longer am I a virgin. . . . It was a rush and I'm still licking my lips for more." Bragg, *supra*. John King and Lawrence Brewer were given death sentences, while Shawn Berry received a life imprisonment sentence. See Robbins, *supra*.

18. Texas has the most executions (approximately 210) since the U.S. Supreme Court allowed the resumption of capital punishment in 1976. See Death Penalty Information Center (visited Feb. 28, 2000) <<http://www.essential.org/dpic/dpicexec.html>>. The state with the second most executions, Virginia, has 2.5 times fewer executions than Texas. See Stephen B. Bright, *Death in Texas*, THE CHAMPION (NATIONAL ASSOCIATION OF CRIMINAL DEFENSE LAWYERS), July 1999, at 2, 3.

19. See Robbins, *supra* note 17, at 1A. One study showed that African American defendants are four times as likely to receive the death penalty. See RICHARD C. DILLER, *THE DEATH PENALTY IN BLACK AND WHITE: WHO LIVES, WHO DIES, WHO DECIDES* 2 (1998). Of the U.S. counties using the death penalty, 98% of the Chief District Attorneys are white, and "in 96% of these reviews, there was a pattern of either race-of-victim or

In 1991, we witnessed the nomination and appointment of African American conservative Clarence Thomas as a justice to the U.S. Supreme Court,<sup>20</sup> replacing long-time Civil Rights activist Thurgood Marshall.<sup>21</sup> Justice Thomas joined an already conservative court, concurring in an

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race-of-defendant discrimination, or both." *Id.* Similar statistics exist in other areas of punishment in the criminal justice system: "For cases of black suspects and white victims the probability of arrest was .336; for cases of black suspects and black victims it was .218; for cases of white suspects and white victims it was .189; and for cases of white suspects and black victims the probability was .107." A COMMON DESTINY: BLACKS AND AMERICAN SOCIETY 475 (Gerald D. Jaynes & Robin M. Williams, eds., 1989) [hereinafter A COMMON DESTINY].

20. Clarence Thomas was nominated by U.S. President George Bush and was sworn in as a Supreme Court Justice October 23, 1991, after extensive debate over his relationship with Anita Hill and his identity. Although African American, Thomas was viewed as very conservative and unsupportive of traditional African American concerns, different from the man he was replacing, noted African American Civil Rights leader Thurgood Marshall. See Gregory Freeman, *Thomas' Backers Feel Betrayed*, ST. LOUIS POST-DISPATCH, Oct. 17, 1993, at 4B. Justice Thomas's appointment prompted U.S. Court of Appeals for the Third Circuit Justice A. Leon Higginbotham's November 29, 1991, *Open Letter to Justice Thomas*, in which he stated,

By elevating you to the Supreme Court, President Bush has suddenly vested in you the option to preserve or dilute the gains this country has made in the struggle for equality. . . . When I think of your appointment to the Supreme Court, I see not only the result of your own ambition, but also the culmination of years of heartbreaking work by thousands who preceded you. I know you may not want to be burdened by the memory of their sacrifices. But I also know that you have no right to forget that history. Your life is very different from what it would have been had these men and women never lived.

A. Leon Higginbotham, *An Open Letter to Justice Clarence Thomas from a Federal Judicial Colleague*, 140 U. PA. L. REV. 1005, 1007 (1992).

Many had second thoughts about Thomas's appointment in retrospect:

"Clarence Thomas is a tragic case, perhaps one of the most tragic in the history of African-Americans," says William B. Nelson, professor of political science and Black studies at Ohio State University. "He represents a tragic case for several reasons: He has moved to the right of Justice Scalia, which makes him one of the most conservative and racist judges on the [C]ourt. He makes Booker T. Washington seem like a member of the Black Panthers."

George E. Curry & Trevor W. Coleman, *Supreme Insult: Clarence Thomas Moves to the Right on a Conservative Court*, EMERGE, Nov. 30, 1996, at 38, available in 1996 WL 15657681. Royce Esters, president of the local NAACP in Compton, CA, stated: "I, along with 57 percent of other blacks in this nation, were concerned . . . We assumed he would be sensitive to black people . . . Clarence Thomas has turned out to be the house Negro." James Warren, *Emerge Indicts Justice Thomas for 'Betrayal'*, CHICAGO TRIB., Oct. 21, 1993, at 2. Additionally, Derrick Bell, a former Professor at Harvard, also agreed stating he "is not surprised because Thomas has built his whole career on 'dissing' [b]lack folks." Vernon Jarrett, *Thomas Disappoints Black Supporters*, CHICAGO SUN-TIMES, Oct. 17, 1993, at 49. Furthermore, Spike Lee, film director, proclaimed that "Malcolm X, if he were alive today, would call Thomas a handkerchief head, a chicken-and-biscuit eating Uncle Tom." Freeman, *supra*.

opinion considered a setback to racial gains in the 1995 *Adarand Constructors, Inc. v. Peña* decision.<sup>22</sup> In *Adarand*, the Supreme Court applied the strict scrutiny standard to all federal race-based classifications despite the benefit or burden to the affected race.<sup>23</sup> Strict scrutiny makes it more difficult to implement legislation designed to correct past and present racial ills.<sup>24</sup> In his concurring opinion in *Adarand*, Justice Thomas noted that with regard to affirmative action programs,<sup>25</sup> "[I]nvariably, such programs engender attitudes of superiority or . . . provoke resentment among those who believe that they have been wronged by the government's use of race . . . These programs . . . may cause [minorities] to develop dependencies or to adopt an attitude that they are 'entitled' to preferences."<sup>26</sup>

Another judicial setback during the last decade was *Hopwood v. Texas*.<sup>27</sup> Relying heavily on the 1994 Fourth Circuit case *Podberesky v. Kirwan*<sup>28</sup> and the strict scrutiny analysis required for race-classifications made by state governments in *City of Richmond v. J.A. Croson*,<sup>29</sup> the Fifth Circuit declared that affirmative action programs designed to achieve diverse student bodies were insufficient to meet the compelling governmental interest and narrowly tailored prongs of the strict scrutiny test.<sup>30</sup> The Fifth Circuit court reasoned,

21. After 21 years working as a lawyer for the NAACP and federal court, Thurgood Marshall became the first African American U.S. Supreme Court Justice when President Lyndon B. Johnson appointed him to the bench in 1967. See *This Person in Black History: Thurgood Marshall (1908-1993)* (visited Mar. 28, 2000) <[http://www.al.mit.edu/~isbell/HFh/black/events\\_and\\_people/html/001.thurgood\\_marshall.html](http://www.al.mit.edu/~isbell/HFh/black/events_and_people/html/001.thurgood_marshall.html)>. Marshall served as a U.S. Supreme Court Justice until his retirement on June 28, 1991. See *id.* He passed away on January 24, 1993.

22. *Adarand Constructors, Inc. v. Peña*, 515 U.S. 200 (1995) (plurality opinion).

23. *Id.* at 227.

24. Applying strict scrutiny to legislation which imposes racial classification by a government actor makes it more difficult to implement the legislation, because in order to be found constitutional, the government must show that the legislation is narrowly tailored to further a compelling government interest. See *id.* Prior to *Adarand*, a government under intermediate scrutiny only needed to show that the legislation served important governmental objectives and was substantially related to achieving those objectives. See *Metro Broadcasting, Inc. v. Federal Communication Commission*, 497 U.S. 547, 564-66 (1990). *Adarand* overturned the Supreme Court's 1990 *Metro* decision. *Adarand Constructors, Inc.*, 515 U.S. at 227.

25. See *id.* at 240-41 (Thomas, J., concurring).

26. *Id.* at 241 (Thomas, J., concurring).

27. *Hopwood v. Texas*, 78 F.3d 932 (5th Cir. 1996), *cert. denied*, 518 U.S. 1033 (1996).

28. *Podberesky v. Kirwan*, 38 F.3d 147, 151 (4th Cir. 1994) (finding that the University of Maryland at College Park had not provided sufficient evidence that a separate merit scholarship program for African Americans was narrowly tailored to serve its stated objectives).

29. *City of Richmond v. J.A. Croson*, 488 U.S. 469 (1989) (plurality opinion).

30. See *Hopwood*, 78 F.3d at 948.

Within the general principles of the Fourteenth Amendment, the use of race in admissions for diversity in higher education contradicts, rather than furthers, the aims of equal protection. Diversity fosters, rather than minimizes, the use of race. It treats minorities as a group, rather than as individuals. It may further remedial purposes but, just as likely, may promote improper racial stereotypes, thus fueling racial hostility.<sup>31</sup>

The *Hopwood* decision was part of a wave of dismantling affirmative action programs, which included California's 1996 Proposition 209,<sup>32</sup> the chief proponent of which was African American conservative Ward Connerly.<sup>33</sup>

Not only do court decisions in the last decade reveal setbacks in gains for African Americans, those hired to research and help write Supreme Court decisions, with the potential to themselves serve in judicial decision-making capacities as future justices, are overwhelmingly white.<sup>34</sup> For instance, only seven of the total 428 clerks that have been hired by Supreme Court justices over the years have been African American.<sup>35</sup> In their collective forty years as justices, Chief Justice William Rehnquist and Justice Antonin Scalia have hired no African American.<sup>36</sup> In Justice Thomas' eight years on the Court, of the thirty-three clerks he has hired, only one has been African American.<sup>37</sup>

Education and politics have included their share of racial setbacks recently. In 1992, Harvard University failed to hire an African American woman professor despite protests by one of its male Black professors, Derrick Bell.<sup>38</sup> Harvard does now have Lani Guinier, an African Ameri-

31. *Id.* at 945.

32. Proposition 209 barred racial preferences by state actors including universities. See Jim Carlton, *Camp Offers Poor Kids a Bridge to College Life*, WALL ST. J., Mar. 29, 2000, at CA1.

33. Appointed by California State Governor, Pete Wilson, to lead the state's affirmative action programs, Ward Connerly has been termed by California Business Council for Equal Opportunity Chairman, Fred Jordan, as "a 'houseboy' and a 'paid assassin' for entrenched conservative and Republican interests in the state." B. Drummond Ayres, Jr., *Fighting Affirmative Action, Leader's Race Looms Large*, N.Y. TIMES, Apr. 18, 1996, at A1.

34. As will become evident in the authorities quoted in this piece, there is great diversity in the format of terms used to describe "whites" and "Blacks." Some prefer to capitalize both terms, others prefer to leave both terms uncapitalized. Still others tend to capitalize "Black" while leaving "white" uncapitalized. I use this latter format, although I do tend to capitalize "white" when used in conjunction with "America," i.e. "White America."

35. See Trevor W. Coleman, *Supreme Bias*, EMERGE, July-Aug. 1999, at 59, 61.

36. See *id.*

37. See *id.*

38. Derrick Bell became Harvard University School of Law's first tenured African American professor in 1971. See Bob Egelko, *Bell Ponders Minorities in Law* (visited Mar.



can woman. But, when U.S. President Bill Clinton nominated Guinier as the Assistant Attorney General for Civil Rights, her nomination was retracted because of opposition to her critique of single member districts and support of cumulative voting systems as a means to counter African American slow political progress.<sup>39</sup>

Another example in the last century of an African American halted in his aim to help the United States progress past negative racial sentiments was Jesse Jackson, who limited his attempts at the U.S. Presidency to 1984 and 1988.<sup>40</sup> However, Jackson's influence on politics and policy has continued, and in 1999, he expanded his message to include stronger business exposure for African Americans.<sup>41</sup> By the end of the Twentieth century, only one African American-owned and -controlled business had embarked on billion-dollar-plus status,<sup>42</sup> only one African American-owned and -controlled company had been exposed to the capital availability of

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25, 2000) <<http://www.worldafricannet.com/news/newes/8011.html>>. In 1990, Professor Bell took an unpaid leave of absence protesting Harvard Law School's failure to tenure an African American woman professor. *See id.* When his leave expired in 1992, and Harvard Law still had not hired an African American woman, Professor Bell resigned. *See id.* He is now a professor at New York University School of Law. *See id.*

39. Lani Guinier was nominated for the Assistant Attorney General for Civil Rights position in 1993. *See* Marion Davis, Davis, *Bucking the Trend of 'Winner Takes All'* PROVIDENCE J., Feb. 11, 1999, at B01. However, on June 3, 1994, Clinton retracted his nomination because of criticism of Guinier's views on cumulative voting, which is used in many other jurisdictions and in many corporate decision structures. *See id.*

40. *See* ELIZABETH O. COLTON, *THE JACKSON PHENOMENON: THE MAN, THE POWER, THE MESSAGE* 10-12 (1989).

41. Jesse Jackson launched his Wall Street Project in 1997. This project aimed to open the world of big business to more minorities and minority businesses. *See generally* Charles Gasparino, *Deals and Deal Makers: Sharpton, Making Move into Jackson's Territory, To Aid Minority-Owned Concerns on Wall Street*, WALL ST. J., Nov. 11, 1999, at C21, available in 1999 WL-WSJ 24921609; Charles Gasparino, *Deals and Deal Makers: Minority-Owned Brokers Fume over AT&T Offering*, WALL ST. J., Nov. 11, 1999, at C1, available in 1999 WL-WSJ 24921540.

42. TLC Beatrice International Holdings, Inc., was created in 1987 by Reginald Lewis to buy out Beatrice International for \$985 million; the giant food company had operations in 18 countries with sales totaling \$1.5 billion. *See* Jonathan P. Hicks, *Reginald F. Lewis, 50, Is Dead; Financier Led Beatrice Takeover*, N.Y. TIMES, Jan. 20, 1993, at A1. Since his death on January 19, 1993, TLC Beatrice has slowly begun to liquidate its assets. *See Beatrice Dissolving Continues*, SAN ANTONIO EXPRESS-NEWS, May 28, 1999, at A1.

the New York Stock Exchange,<sup>43</sup> and only three African Americans held the position of CEO at Fortune 500 companies.<sup>44</sup>

Persisting real and perceived racial barriers continue to exist in business, politics, education, and in many other areas as "Blacks and whites continue to experience a different reality in virtually every area of post-civil rights America."<sup>45</sup> This reality is placed into perspective when research suggests that white high-school dropouts in some parts of the United States earn more than college-educated African Americans.<sup>46</sup> Black America's frustration with continuing race issues was evidenced by the October 16, 1995, Million Man March, organized by Nation of Islam leader Louis Farrakhan. The Million Man March became the largest gathering of African Americans in Washington, D.C.,<sup>47</sup> eclipsing Dr. Martin Luther King, Jr.'s 1963 March on Washington where he delivered

43. See DEREK T. DINGLE, *BLACK ENTERPRISE TITANS OF THE BE 100S: BLACK CEO'S WHO REDEFINED AND CONQUERED AMERICAN BUSINESS* 29 (1999). BET Holdings, which owns and operates the Black Entertainment Television (BET) Cable Network and controls a number of other media and entertainment businesses that target African Americans, was taken public on the New York Stock Exchange by its founder and CEO Robert Johnson in October 1991. See *id.* Although BET Holdings II went private again in October 1997, the accomplishment of being exposed to public capital on the NYSE is a significant step for African American business. See *id.* at 47-49.

44. See Robyn D. Clarke, *Has the Glass Ceiling Really Been Shattered?*, *BLACK ENTERPRISE*, Aug. 1, 2000, available in 2000 WL 12145782. Franklin Raines took over as CEO at Fannie Mae January 1, 1999. See Telephone Interview with Representative, Fannie Mae (Feb. 4, 2000) (on file with *The Scholar: St. Mary's Law Review on Minority Issues*). A. Barry Rand became CEO at Avis Rent A Car, Inc., on December 18, 1999. See Telephone Interview with Representative, Avis Rent A Car, Inc. (Feb. 4, 2000) (on file with *The Scholar: St. Mary's Law Review on Minority Issues*). Lloyd D. Ward became CEO at Maytag Corp. on August 12, 1999. See Marjorie Whigham-Desir, *A Watershed Appointment*, *BLACK ENTERPRISE*, Aug. 1, 1999, at 15, available in 1999 WL 11066255. Kenneth I. Chennault will become the next CEO at American Express in 2001. See Telephone Interview with Representative, American Express (Feb. 4, 2000) (on file with *The Scholar: St. Mary's Law Review on Minority Issues*).

45. Magee, *supra* note 1, at 872. Recent statistics reveal that African American families earn 58% of what white families earn. See *id.* African American lawyers earn 79% of the average income of white male lawyers. See *id.* In addition, "Only 3.4% of all Black men earn \$50,000 or more, compared to 12.1% of white men[.] [a]nd 44.8% of Black children live below the poverty line, compared to only 15.9% of white children." *Id.* Lastly, while African-Americans make up 10.1% of the total workforce, of that 10.1%, 24.8% are "hotel maids and housemen and 21.8% are janitors and cleaners . . ." *Id.* Conversely, only 3.6% of Blacks make-up the nation's engineers, 3.2% of attorneys, 3.0% of doctors, and 0.9% of the country's architects. See *id.* at 872-73.

46. See Kevin Chappell, *What They Don't Tell You About Affirmative Action*, *EBONY*, Aug. 1995, at 46, available in 1995 WL 12227274.

47. Attendance estimates range from 400,000 by the National Park Services to 837,000 by Boston University's Remote Sensing Center. See Dahdee, *Keep-It-Real! Goes to the Million Man March* (visited Mar. 21, 2000) <[http://www.charm.net/~ces/keep\\_it\\_real/Kmillion.html](http://www.charm.net/~ces/keep_it_real/Kmillion.html)>.

his "I Have a Dream" speech before approximately 250,000 people.<sup>48</sup>

So, that is race in the United States as we close out the Twentieth century and enter the Twenty-first, forty-five years after Rosa Parks sat in her seat at the front of the segregated bus igniting the Civil Rights Movement,<sup>49</sup> and 380 years after slavery began.<sup>50</sup> Unfortunately, adding to the list of setbacks in the race equation as we enter the Twenty-first century, is the fact that efforts by proponents of reparations<sup>51</sup> – an official apology and/or some form of compensation – have been met with dissension and rejection.

This paper will explore the underlying issues of race still faced by the United States. This exploration will occur in the context of present efforts to obtain African American reparations. Part II of this paper will give some background and history on reparations. Part II will also reveal the difficulty courts have faced in finding an appropriate foundation upon which to legally grant African American reparations and Congress' unwillingness to even discuss the possibility of providing the necessary legislation to grant outright reparations to African Americans or to provide the legal basis upon which the courts can do so. Parts III, IV, and V will discuss the roles of White Americans, African Americans, and the general community of color, respectively, in prolonging the racial predicament in the United States and ways that each group can limit the perpetuation of racial tension.

African American reparations is a moral and just part of the total effort necessary to repair, or at least assuage, the racial tension that was created years ago and persists today. But, we must first look closely, understand, acknowledge, and deal with much of what underlies this country's hesitance in granting reparations. It is in this first step that we will find there is a lot to be repaired before we even get to African American reparations!

## II. BACKGROUND

Reparations is a well-recognized and established principle in domestic and international law.<sup>52</sup> Adjoa Aiyetoro, Director of the National Con-

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48. See Alex Poinsett, *The March on Washington: August 28, 1963* (visited Mar. 21, 2000) <<http://jointctr.org/selpaper/themarch.htm>> (excerpting Alex Poinsett's *Walking with Presidents and the Rise of Black Political Party*).

49. See CURRENT, *supra* note 4, at 840-41 (revealing that Rosa Parks refused to relinquish her seat in Montgomery, AL, on December 1, 1995).

50. See *id.* at 65 (acknowledging that the first slaves arrived in Colonial America in 1620).

51. The term "reparations" signifies an official apology and compensation, in some form, for African-Americans.

52. See Lori Robinson, *Righting A Wrong*, EMERGE, Feb. 1997, at 43, 45.

ference of Black Lawyers, defines reparations as an effort "to repair a people for significant harm that was done to them and particularly done to them by a government."<sup>53</sup> Reparations is a reprieve granted a group for injustices which have occurred against them, as opposed to an individual award for an individual claim often evident in the judicial system.<sup>54</sup> While affirmative action is generally aimed at remedying *present effects* of past discrimination,<sup>55</sup> reparations, sometimes referred to as restitution, is a present effort *to repair the past*.<sup>56</sup> This can be done through formal apologies and/or some form of compensation, often land or money but sometimes monuments, governmental programs, scholarships, or enterprise zones suffice.<sup>57</sup>

For African Americans, reparations would be aimed, at its most basic level, at repairing the harm and injustices occurring during the Middle Passage<sup>58</sup> and slavery. Reparations can also be directed at the government-sanctioned discrimination and oppression since slavery that has limited the economic and other progression of African Americans.<sup>59</sup> "[T]he motivation behind reparations to African Americans is to provide the means to enfranchise a group that has been intentionally denied the so-

53. *Id.* at 44.

54. See generally Irma Jacqueline Ozer, *Reparations for African Americans*, 41 How. L.J. 479, 495 (1998) (examining the difference in view between the dominant individualistic perspective and the Afrocentric conceptual system).

55. See Robert Westley, *Many Billions Gone: Is It Time to Reconsider the Case for Black Reparations?*, 40 B.C. THIRD WORLD L.J. 429, 429-30 (1998).

56. See Tuneen E. Chisholm, Comment, *Sweep Around Your Own Front Door: Examining the Argument for Legislative African American Reparations*, 147 U. PA. L. REV. 677, 703 (1999).

57. See Westley, *supra* note 55, at 437.

58. The term "Middle Passage" often refers to the route to slavery over the Pacific Ocean from Africa to the Americas and all the atrocities associated with that route and the slave ships that were used.

59. It is important to briefly include in this discussion a mention of the role the courts have played in the historic discrimination against African Americans. In *State v. Post*, the New Jersey Supreme Court held that slavery was not inconsistent with a constitutional declaration that all men were by nature free. *State v. Post*, N.J.L. 368, 378 (1845). The court asserted that no one is absolutely free and that freedom must be looked at in the context of what is acceptable by society. See *id.* at 369. In 1856, the Supreme Court in *Dred Scott v. Sanford*, similarly concluded that "Negroes" were not included nor intended to be citizens in the constitutional sense since "Negroes" were considered inferior. *Dred Scott v. Sanford*, 60 U.S. 393, 405 (1856). As mentioned, in 1896, the Court in *Plessy v. Ferguson*, determined that the Thirteenth and Fourteenth amendments were aimed to enforce absolute equality of the two races before the law. *Plessy v. Ferguson*, 163 U.S. 537, 544 (1896). It could not, however, have been intended to abolish distinctions based upon color. See *id.* Nor could it be intended to enforce social, as distinguished from political, equality or a commingling of the two races upon terms unsatisfactory to either. See *id.*

cial status, resources, and well-being required to enjoy the civil and political rights to which every United States citizen is entitled."<sup>60</sup>

#### A. *Reparations in the United States: Native Americans*

Often, when we think of reparations in the United States, we think of something that is uncommon and almost radical or militant.<sup>61</sup> However, reparations has been a U. S. practice in several contexts for some time. In the United States, the discussion of reparations begins with Native Americans. When the European settlers came to the United States, Native American culture, religion, and way of life were misunderstood and undermined.<sup>62</sup> As the European settlers came into America, they took, among other things, land from the Native Americans, thereby reducing Native American holdings from 138 million acres in 1887 to fifty-two million acres in 1934, of which twenty-six million acres has been lost through fraudulent transfers.<sup>63</sup> American courts were able to justify the newly arriving Europeans' control over Native Americans and the taking of their land by classifying Native Americans as "savage"<sup>64</sup> and as occupants of the land, while classifying Europeans as possessors.<sup>65</sup>

In 1851, the U.S. government began efforts to grant reparations to the Native American nations in the United States.<sup>66</sup> In an effort to repair the taking of land from Native Americans and the near extermination of Native American culture, the federal government sectioned off parcels of land into "concentrations," later called "reservations,"<sup>67</sup> upon which the

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60. Chisholm, *supra* note 56, at 719. Furthermore,

If you practice slavery, discrimination, racism, or any of those things for some period of time, it does have an impact on the future well-being of that group. . . . The main consequence for future generations of current discrimination or past discrimination is that it reduces the capital of accumulation . . . . If it is desirable to equalize the status of the races in the future, then there must be some make up, some compensation, some reparations, whatever you want to call it, for the capital that these groups were prevented from accumulating. Otherwise, the past will continue to perpetuate itself throughout the future.

Robinson, *supra* note 52, at 45.

61. See Westley, *supra* note 55, at 432-33.

62. See generally CURRENT, *supra* note 4, at 484 (describing the process of white demands of 'concentration' and how it changed Native American way of life).

63. See Paul Brest & Miranda Oshige, *Affirmative Action for Whom?*, 47 STAN. L. REV. 855, 881 (1995) (citing Frank Pommersheim, *The Reservation as Place*, 34 S.D. L. REV. 246, 256, 261 (1989)).

64. See *Johnson v. M'Intosh*, 21 U.S. (8 Wheat.) 543, 590 (1823).

65. See *id.* at 564-69.

66. See CURRENT, *supra* note 4, at 484 (stating that Native American Indian tribes began receiving reservations in 1851).

67. See *id.* The aim of this section of the paper is to report the fact of reparations. I will leave it to others to debate the merits of the reparations given.

Native American nations would have the autonomy to develop their own laws separate and apart from state and federal laws. In 1946, a federal statute<sup>68</sup> established the Indian Claims Commission with "jurisdiction to hear and resolve claims arising from the seizure of Indian property and breaches by the United States of its treaties with the Indian nations and tribes."<sup>69</sup>

More recently, a federal district court<sup>70</sup> in December, 1999, awarded reparations to Native Americans for a century of Indian trust fund mismanagement by the U.S. Department of the Interior and Treasury.<sup>71</sup> These trust funds were established in the 1830s during President Andrew Jackson's administration in order to compensate Native Americans for past injustices.<sup>72</sup> As a result of United States government's mismanagement, the district court awarded Native Americans \$2.5 billion in royalties.<sup>73</sup>

#### B. *Reparations in the United States: Japanese Americans*

Moreover, the United States has recently given reparations to Japanese Americans for past offenses committed against them by the U.S. government. During World War II, Japanese Americans were labeled "devious, malign and cruel."<sup>74</sup> Through Executive Order 9066, issued on February 19, 1942, U.S. President Franklin D. Roosevelt authorized the removal, or internment, of more than 100,000 Japanese Americans to "relocation centers."<sup>75</sup> "[O]ur government made it a criminal offense for Japanese Americans to live in their homes, to raise their families in the communities they had chosen and established, and to return to those communities and homes."<sup>76</sup> Order 9066 has been found to be largely a result of America's unwarranted anger and prejudice toward Japanese Americans

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68. Act of Aug. 13, 1946, ch. 959, § 1, 60 Stat. 1049 (West 1999).

69. Graham Hughes, *Reparations for Blacks?*, 43 N.Y.U. L. REV. 1063, 1063-64 (1968); see also Ozer, *supra* note 54, at 480.

70. See Robert L. Jackson, *Judge to Oversee Agency Effort to Compensate Indians*, SAN ANTONIO EXPRESS-NEWS, Dec. 22, 1999, at 10A.

71. See *id.*; see also John Gibeaut, *Another Broken Trust*, A.B.A. J., Sept. 1999, at 40-47.

72. See Jackson, *supra* note 70, at 10A. "Federal officials are supposed to manage the accounts and pass along royalties. . ." *Id.* The government claims that it has deposited between \$350 million and \$500 million a year for decades into the accounts. See *id.* However, months of testimony in federal district court revealed that officials have been unable to account for how all the money has been allocated. See *id.*

73. See *id.*

74. See CURRENT, *supra* note 4, at 783-84.

75. See *id.* at 782-84; Vincene Verdun, *If the Shoe Fits, Wear It: An Analysis of Reparations to African Americans*, 67 TUL. L. REV. 597, 649 (1993).

76. *Ishida v. United States*, 59 F.3d 1224, 1227 (1995).

as opposed to any military and government strategy.<sup>77</sup> In addition to enduring humiliation and losing jobs, opportunities, and possessions, the interned Japanese Americans lost their civil liberties.<sup>78</sup> Despite these effects Executive Order 9066 was upheld by the Supreme Court in *Korematsu v. United States* in 1944.<sup>79</sup> Japanese Americans sought reparations for many years for government-mandated treatment of them during World War II.<sup>80</sup>

In 1980, Congress established the Commission on Wartime Relocation and Internment of Civilians primarily to review the impact of Executive Order 9066 and consider the possibility of reparations for Japanese Americans.<sup>81</sup> The Commission was authorized to review the order and determine what reparations, if any, would be implemented.<sup>82</sup> In 1982, the Commission published a 467-page report concluding the following:

The promulgation of Executive Order 9066 was not justified by military necessity, and the decisions which followed from it – detention, ending detention and ending exclusion – were not driven by analysis of military conditions. The broad historical causes which shaped these decisions were race prejudice, war hysteria and a failure of political leadership. Widespread ignorance of Japanese Americans contributed to a policy conceived in haste and executed in an atmosphere of fear and anger at Japan. A grave injustice was done to American citizens and resident aliens of Japanese ancestry who, without individual review or any probative evidence against them, were excluded, removed and detained by the United States during World War II.<sup>83</sup>

As a response to the recommendation by the Commission, Congress passed the Civil Liberties Act of 1988,<sup>84</sup> which required the payment of

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77. See Verdun, *supra* note 75, at 649.

78. See Westley, *supra* note 55, at 449-50.

79. *Korematsu v. United States*, 323 U.S. 214 (1944). "Korematsu remains the only case of a racial classification, concededly not 'benign,' that has been subjected to and has survived 'strict scrutiny.'" Reggie Oh & Frank Wu, *The Evolution of Race in the Law: The Supreme Court Moves from Approving Internment of Japanese Americans to Disapproving Affirmative Action for African Americans*, 1 MICH. J. RACE & L. 165, 168 (1996).

80. See *Korematsu*, 322 U.S. at 214.

81. The American Japanese Evacuation Claims Act, ch. 814, 62 Stat. 1231 (1948).

82. See Magee, *supra* note 1, at 887.

83. COMMISSION ON WARTIME RELOCATION, *supra* note 2, at 18.

84. See 50 U.S.C. § 1989b-4 (1994).

\$20,000 to each survivor of World War II internment camps and an official apology to Japanese Americans as a whole.<sup>85</sup>

### C. *Reparations in Germany*

While other United States examples of reparations exist,<sup>86</sup> and the United States is presently exploring allegations that the U.S. army massacred 300 civilians at No Gun Ri during the opening weeks of the Korean War in July 1950<sup>87</sup> which may lead to reparations to those survivors,<sup>88</sup> reparations is also an important remedial tool internationally.<sup>89</sup> Recently, Pope John Paul II apologized for the wrongdoings of Roman Catholics done in the name of faith.<sup>90</sup>

Germany's example of reparations to Holocaust victims is most notable in the international arena. Germany began giving compensation in 1952 to Holocaust victims<sup>91</sup> and has made over \$60 billion in payments to these victims.<sup>92</sup> Chief German envoy Otto Lambsdorff urged that the need for such compensation was based on the fact that these were "state-sponsored crimes."<sup>93</sup> With regard to a recent \$5.2 billion fund established by Germany to compensate Nazi-era labor victims, U.S. Secretary of State Madeleine Albright stated, "[T]his is the first serious initiative to acknowledge the debt owed to those whose labor was stolen or coerced

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85. See 50 U.S.C. §§ 1989(2), 1989b-4(a)(1) (1994); see also *Ishida v. United States*, 59 F.3d 1224, 1227 (Fed. Cir. 1995); Eric K. Yamamoto, *Race Apologies*, 1 J. GENDER, RACE & JUST. 47, 47 (1997).

86. Since 1971, indigenous Alaskans have reaped the benefit of approximately \$1 billion and over 44 million acres of land through the Alaska Native Claims Settlement Act. See Robinson, *supra* note 52, at 45. In 1993, Congress apologized to indigenous Hawaiians for the illegal 1893 overthrow of the sovereign Hawaiian nation by the United States. Pub. L. No. 103-150, 107 Stat. 1510, 1513 (1993); see also Yamamoto, *supra* note 85, at 47.

87. See Mark Thompson, *The Bridge at No Gun Ri: Did Panicky American G.I.'s Massacre Korean Civilians at the Beginning of the Korean War?*, TIME, Oct. 11, 1999, at 42, 42. This massacre ranks as "the century's second deadliest committed by US troops, trailing only the 1968 My Lai massacre in Vietnam, where G.I.s killed up to 500 noncombatants." *Id.*; Sang-Hun Choe et al., *Massacre at 'No Gun Ri Bridge': The Secret's Out*, SAN ANTONIO EXPRESS-NEWS, Sept. 30, 1999, at 1A.

88. See *No Gun Ri Reparations Urged*, SAN ANTONIO EXPRESS-NEWS, Mar. 7, 2000, at 7A.

89. See generally Yamamoto, *supra* note 85, at 68-73.

90. See Matthew Kalman, *Reaction to Pope's Apology is Mixed*, USA TODAY, Mar. 13, 2000, at 10A; Robert A. Sirico, *The Pope's Nostra Culpa*, WALL ST. J., Mar. 15, 2000, at A26.

91. See Robinson, *supra* note 52, at 45.

92. See Burt Herman, *Germany Offers Apology with Compensation Offer*, SAN ANTONIO EXPRESS-NEWS, Dec. 18, 1999, at 21A.

93. *Id.*



during that time of outrage and shame.”<sup>94</sup> In support of the negotiations process, the U.S. considered contributing \$10 million to this fund.<sup>95</sup>

#### D. *History of African American Reparations*

The movement for reparations for African Americans has been around for years, but it received heightened inspiration when reparations were given to Japanese Americans.<sup>96</sup> Recently, John Singleton’s 1997 film *Rosewood* documented the reparations story of the 1923 African American residents (and 143 of their descendants) of Rosewood, Florida.<sup>97</sup> The residents divided \$2 million in reparations in 1994 for their Black community that was burned down by whites when a white woman lied about being assaulted by an African American man.<sup>98</sup>

Even more recently, African Americans in Oklahoma are seeking reparations for the two-day 1921 race riot aimed at African American success and resulting in the destruction of Tulsa’s Greenwood section known as “Black Wall Street.”<sup>99</sup> On February 4, 2000, an 11-member Tulsa Race Riot Commission<sup>100</sup> recommended to the state legislature that reparations be made to the African American survivors of the Tulsa race riot.<sup>101</sup> Although reparations in Florida and potential reparations in Oklahoma are state-based, they parallel the ongoing effort for reparations on the federal level.

Unfortunately, the federal government has offered little compensation to its African American population. This lack of compensation has occurred in spite of calls for African American reparations as early as the

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94. *Id.*

95. *See id.*

96. “When Congress approved funds for Japanese-Americans interned during World War II, and the U.S. Attorney General knelt, in a tearful apology, before the recipient of the first \$20,000 payment, African Americans believed the issue of reparations as compensation for the efforts of slavery, was one whose time has come.” 136 CONG. REC. E3606-01 (daily ed. Oct. 27, 1990) (statement by Rev. Marvin A. McMickle). In addition, the fact that reparations has been used to address past wrongs done to members of other cultures is one reason why the promise of “40 acres and a mule” should not be forgotten by African Americans. *See Robinson, supra* note 52, at 45.

97. *See id.* at 48.

98. *See id.*

99. *See* Greg Wright, *Tulsa’s 1921 Race Riot Brings Demands for Reparations*, SAN ANTONIO EXPRESS-NEWS, Feb. 2, 2000, at 6A.

100. The Commission was created by the Oklahoma Legislature more than two years ago to investigate the “massacre” that took place in Tulsa’s Greenwood section. *See* Jim Yardley, *Panel Recommends Reparations in Long-Ignored Tulsa Race Riot*, N.Y. TIMES, Feb. 5, 2000, at 1A.

101. *See id.*

Revolutionary Era in 1774, when in speaking of the “wickedness of the slave-trade,”<sup>102</sup> Thomas Paine stated,

The past treatment of Africans must naturally fill them with abhorrence of Christians; lead them to think our religion would make them more inhuman savages, if they embraced it; thus the gain of that trade has been pursued in opposition to the redeemer’s cause, and the happiness of men: Are we not, therefore, bound in duty to him and to them to repair these injuries, as far as possible, by taking some proper measures to instruct, not only the slaves here, but the Africans in their own countries? . . . [W]hat singular obligations are we under to these injured people!<sup>103</sup>

Pennsylvania Congressman Thaddeus Stevens, Commissioner Oliver O. Howard, and other members of the Freedmen’s Bureau<sup>104</sup> were among the chief proponents of African American reparations ideologies after the Civil War.<sup>105</sup> The primary aim of these advocates was the redistribution of land.<sup>106</sup> Stevens advocated seizing 400 million acres from wealthy Southerners and distributing the land to former slaves.<sup>107</sup> Steven’s urgings formed the basis of the 1865 Freedmen’s Bureau Act,<sup>108</sup> which promised African Americans 40 acres of land and a mule.<sup>109</sup> However, when President Andrew Johnson succeeded Abraham Lincoln, who was killed just five days after the surrender of the Confederacy and one month after passage of the Freedmen’s Bureau Act,<sup>110</sup> Johnson issued on May 29, 1865, an amnesty proclamation in which he ordered the promises of land to African Americans rescinded and the return of any land that had been given.<sup>111</sup>

During the 1960s Civil Rights Movement, James Forman, the former leader of the Student Non-Violent Coordinating Committee (SNCC), emerged as a dominant figure in the quest for African American reparations.<sup>112</sup> He prepared the *Black Manifesto*, wherein he demanded repara-

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102. Archive of Thomas Paine, *Thomas Paine: African Slavery in America* (visited Mar. 26, 2000) <<http://www.mediapro.net/cdadesign/paine/afri.html>>.

103. *Id.*

104. The Bureau was originally called the Bureau of Refugees, Freedmen, and Abandoned Lands. Its one-year mandate was “to supervise and manage ‘all abandoned lands.’” Magee, *supra* note 1, at 888; see CURRENT, *supra* note 4, at 441.

105. See Magee, *supra* note 1, at 886.

106. See *id.* at 886-87.

107. See CURRENT, *supra* note 4, at 449; Magee, *supra* note 1, at 886-88.

108. The Freedman’s Bureau Act of July 16, 1866, 14 Stat. 173 (1866).

109. See CURRENT, *supra* note 4, at 449.

110. See Robinson, *supra* note 52, at 48-49.

111. See Magee, *supra* note 1, at 889.

112. See *id.* at 883.

tions from white churches and synagogues for their participation in crimes against African Americans.<sup>113</sup> On the morning of May 4, 1969, Forman interrupted New York's Riverside Church Sunday morning service to declare the idea behind his *Manifesto* before a gathering of 1,500 worshippers.<sup>114</sup> He told the crowd:

We are therefore demanding of the white Christian churches and Jewish synagogues which are part and parcel of the system of capitalism, that they begin to pay reparations to black people in this country. We are demanding \$500,000,000 from the Christian white churches and the Jewish synagogues. . . . Fifteen dollars for every black brother and sister in the United States is only a beginning of the reparations due us as people who have been exploited and degraded, brutalized, killed and persecuted. Underneath all of this exploitation, the racism of this country has produced a psychological effect upon us that we are beginning to shake off. We are no longer afraid to demand our full rights as a people in this decadent society.<sup>115</sup>

Under the plan, Forman demanded "a Black land bank; four major publishing and printing industries; four television networks; a research center; a training center; a welfare rights organization; a labor strike and defense fund; a pan-African business cooperative; and a Black university."<sup>116</sup>

#### E. *Present Efforts Toward African American Reparations: Congress and the Courts*

Representative John Conyers,<sup>117</sup> a Democrat from Michigan, the Dean of the Congressional Black Caucus, and the highest ranking Democrat on the House Judiciary Committee, has been on the forefront of the present fight for reparations in Congress.<sup>118</sup> Conyers sponsored a bill in 1989 to study reparations for African Americans.<sup>119</sup> The bill entitled "The Com-

113. *See id.*

114. *See id.* (stating that the *Black Manifesto* stunned White churches).

115. *Id.*

116. *Id.* at 884.

117. Conyers was also at the forefront of efforts to establish a Martin Luther King, Jr. holiday, which took 15 years to acquire - 1968 to 1983. *See* Kevin Merida, *Did Freedom Alone Pay a Nation's Debt?; Rep. John Conyers Jr. Has a Question. He's Willing to Wait A Long Time for the Right Answer*, WASH. POST, Nov. 23, 1999, at C1.

118. *See id.*

119. Representative Conyers introduced a reparations bill for African Americans in 1989, which later was renumbered to H.R. 40. *See* Letter from John Conyers, U.S. Representative, House of Representatives (Oct. 19, 1999) (on file with *The Scholar: St. Mary's Law Review on Minority Issues*).

mission to Study Reparation Proposals for African Americans Act" is primarily aimed at studying the effects of slavery on living African Americans and related policy issues.<sup>120</sup> Even though the bill is a proposal to simply study reparations possibilities and not yet a request for monetary compensation, Conyers's bill has not made it out of congressional committees, and he has attempted to renew his bill each congressional session since 1989.<sup>121</sup>

While some consider efforts to achieve reparations a waste of time, energy, and resources,<sup>122</sup> others have turned individually to the courts for reprove.<sup>123</sup> However, the courts have signaled that congressional efforts may be better suited for granting African American reparation requests rather than courts.<sup>124</sup>

Recently, when Jewel Cato sued for an acknowledgement, damages, and an apology for the United States' enslavement of African Americans and subsequent discrimination,<sup>125</sup> the court rejected her claim on several bases.<sup>126</sup> First, *Cato* attempted to draw similarities between the African American situation and the issues facing Native Americans and the granting of reparations to them.<sup>127</sup> The court rejected this comparison as unpersuasive.<sup>128</sup> The existence of treaties between Native Americans and the United States was an important distinction, having the effect of creating relationships between nations as opposed to a nation and its citizens,<sup>129</sup> and thus leading to greater justification for reparative relief to Native Americans.<sup>130</sup> The court in *Cato* stated,

[T]here is nothing in the relationship between the United States and any other persons, including African American slaves and their de-

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120. See *id.*

121. See Chris K. Iijima, *Reparations and the "Model Minority" Ideology of Acquiescence: The Necessity to Refuse the Return to Original Humiliation*, 19 B.C. THIRD WORLD L.J. 385, 389 (1998); Magee, *supra* note 1, at 881 (stating that Conyers' proposal "can't even get to the House floor for a vote").

122. See 141 CONG. REC. S8376-02 (daily ed. June 14, 1995). Some consider affirmative action sufficient. See *id.* Others argue that "[w]e [apologized] when we passed the 13<sup>th</sup> [1865] and 14<sup>th</sup> [1868] amendments." Courtland Milloy, *An Apology Won't Settle this Debt*, WASH. POST, June 22, 1997, at B1.

123. See Ozer, *supra* note 54, at 486-92 (providing examples of how the courts have looked at reparations).

124. See Westley, *supra* note 55, at 435-36; Jeremy Levitt, *Black African Reparations: Making a Claim for Enslavement and Systematic De Jure Segregation and Racial Discrimination Under American and International Law*, 25 S.U. L. REV. 1, 2 (1997).

125. See *Cato v. United States*, 70 F.3d 1103, 1105 (9th Cir. 1995).

126. See *id.* at 1107, 1109-11.

127. *Id.* at 1108.

128. See *id.*

129. See Verdun, *supra* note 75, at 648; see also *Cato*, 70 F.3d at 1108.

130. See *Cato*, 70 F.3d at 1108.

scendants, that is legally comparable to the unique relationship between the United States and Indian Tribes. Courts have recognized fiduciary responsibilities running from the United States to Indian Tribes because of specific treaty obligations and a network of statutes that by their own terms impose specific duties on the government.<sup>131</sup>

Second, the *Cato* court noted that other present potential statutory grounds for reparative relief for African Americans were insufficient due to a variety of reasons.<sup>132</sup> These reasons include the statute of limitations clause and the sovereign immunity clause making the Federal Tort Claims Act an insufficient basis of relief.<sup>133</sup> In addition, the court ruled there is a lack of specification in constitutional provisions and amendments to warrant claims for reparations.<sup>134</sup>

Finally, the court asserted that specific statutes calling for African American reparations do not exist,<sup>135</sup> as in the case for both Native Americans and Japanese Americans. The court stated that reparations given to Japanese Americans were not awarded by the courts but rather by a congressional statute: The Civil Liberties Act of 1988.<sup>136</sup> Hence, regarding *Cato*'s request for African American reparations, according to the court, "[t]he legislature, rather than the judiciary, is the appropriate forum for plaintiff's grievances."<sup>137</sup> However, as has already been noted, ongoing efforts in Congress have not even made it to the floor for debate.

Since 1988, when Congress authorized payments to surviving Japanese American internees, there has been a resurgence of African American support for reparations.<sup>138</sup> In addition, numerous African American notoriety and organizations have expressed their support of reparations for African Americans, including Reverend Jesse Jackson, the National Association for the Advancement of Colored People (NAACP), the Southern Christian Leadership Conference (SCLC), the National Conference

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131. *Id.*

132. *Id.* at 1107-08.

133. *See id.*

134. *See id.* at 1108. While treaties and statutes impose specific duties on the government, "[s]imilar strictures do not appear in the Thirteenth Amendment alone, or in combination with the other Civil War amendments and the various Civil Rights Acts which have been enacted in the meantime." *Id.*

135. *See id.* at 1106 (stating that Congress has yet to enact a statute giving reparative relief to African Americans).

136. *See Cato*, 70 F.3d at 1106.

137. *Id.* at 1105.

138. *See* Jennifer Warren, *Demanding Repayment for Slavery: The Reparations Movement Is Gaining New Attention. Backers Say Problems Afflicting African Americans Today Are Rooted in Past Injustices. Others Decry the Idea as Impractical and Simplistic*, L.A. TIMES, July 6, 1994, at 1.

of Black Lawyers, and the National Coalition of Blacks for Reparations (N'COBRA).<sup>139</sup> Using the growing conservatism and the recent *Adarand* decision as a beginning point for African American reparations discussions, Congresswoman Carol Moseley-Braun argues,

[W]hat we really need and what we have to search for are new solutions, solutions that will provide opportunity to those who face the higher barriers imposed by racism and discrimination. . . . [T]he *Adarand* decision becomes a starting point, a take-off point for us to begin to have an honest dialog about where we are going in this Nation and how we can go there together. . . . Instead of a deconstructionist approach, tearing down affirmative action and putting nothing in its place, I encourage my colleagues to join in developing creative solutions to the legacy of discrimination in this country.<sup>140</sup>

However, creative solutions to an enduring and sensitive issue are difficult to agree upon. Without a judicial basis for resolution and without any congressional progress towards action, the little debate that does exist has largely centered in coffee shops, barber shops, Black churches, and academic arenas. The discussion and resulting stalemate have revealed that America has much to repair. Before it gets to reparations, there are some real and underlying problems which the United States must first resolve.<sup>141</sup> The problems stem from three roots: White America, Black America (specifically African Americans),<sup>142</sup> and other communities of color. If these three roots can be affected and changed, racial tension can be acquiesced and African American reparations can become a reality.

### III. WHITE AMERICA

The politics of race with respect to African American reparations might begin with an analysis of one root of the continuing problem of race in America – that found within the White American community. Since the generation of racial tension by historic White America, this country has continued to show “a particular reluctance to absorb people of African descent.”<sup>143</sup> While progress has and continues to be made, this progress has been slow, cautious, and incremental, resulting in frag-

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139. See Robinson, *supra* note 52, at 44; Warren, *supra* note 138, at 1.

140. 141 CONG. REC. S8376-02 (daily ed. June 14, 1995).

141. See text *infra* Parts III, IV, and V.

142. I will refer to “Black America” to define the diaspora of Black people from Africa, the Caribbean, the U.S., and other locations. The term “African American” is meant to indicate a subset of that diaspora, indicating those who were born and/or hold citizenship in the U.S.

143. ANDREW HACKER, TWO NATIONS: BLACK AND WHITE, SEPARATE, HOSTILE, UNEQUAL 12 (1992).

mented and often incomplete gains.<sup>144</sup> The reluctance on the part of White America has again become obvious in the movement for African American reparations.

A. *Lack of Responsible White Congressional Leadership and the Politics of Power*

While the courts have suggested African American reparations would be better achieved via congressional legislation, the white congressional leadership has been reluctant to even discuss the possibility of reparations for the past wrongs of America, indeed White America.<sup>145</sup>

In response to the reluctance of White America to absorb Black America through reparations, one commentator questions "Where is the responsible white leadership? . . . When I think about the Southern Baptist Convention's apology two years ago for its defense of slavery in the past, I am hopeful that something more positive is happening out in the rest of America than here in official Washington."<sup>146</sup> Once African American reparations legislation moves from committees to the congressional floor for debate, there can be more opportunity for review, discussion, and consideration of the issue. If nothing else, the existence of continuing race problems and their underlying sources and contribution to the perpetuation of race problems today can be acknowledged and addressed.

And, while leadership is one of the cruxes of the problem, the issue of reluctance within the general white community is felt even deeper – grounded in fear and ignorance.<sup>147</sup> The existence, or even the discussion, of the politics of inclusion, and the reality of changing demographics threatens the status quo power structure and its components.<sup>148</sup> Power is

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144. See Richard Delgado, *Recasting the American Race Problem*, 79 CAL. L. REV. 1389, 1400 (1991) (book reviewing ROY L. BROOKS, *RETHINKING THE AMERICAN PROBLEM* (1990)).

145. See *infra* text Section II.

146. Milloy, *supra* note 122, at C1.

147. See Thomas W. Merrill, *Three Models of Affirmative Action Beneficiaries*, 19 HARV. J.L. & PUB. POL'Y 779, 780 (1996) (asserting that whites, specifically white males, are reluctant to relinquish power to those groups who have historically been viewed as subordinate). The underlying motivation for this failure to share power is to boost the status of their group at the expense of others. See *id.*; see also Marc Seitles, *The Perpetuation of Residential Racial Segregation in America: Historical Discrimination, Modern Forms of Exclusion, and Inclusionary Remedies*, 14 J. LAND USE & ENVT'L. L. 89, 106 (1998) (acknowledging residential racial segregation as an example of white ignorance toward race).

148. See Jacqueline Johnson, et al., *Reducing Inequalities: Doing Anti-Racism: Toward an Egalitarian American Society*, 29 CONTEMP. SOC'Y. 95 (2000), available in 2000 WL 15902648.

a tremendous tool, but the fear of losing that power is even more potent. With White America having founded the power structures in the United States and presently, for the most part, directing and controlling them,<sup>149</sup> there exists a fear of increased competition and the possibility of sharing, or even losing that power and control to others.<sup>150</sup>

African American reparations requires an admission of wrongdoing and an attendant guilt, which are in-and-of-themselves difficult for White America to accept.<sup>151</sup> In addition, this admission, particularly because of the expansiveness and depth of the past and persistent wrongdoing, even when compared to the internment of Japanese Americans during World War II, threatens the very structure that the wrongdoing created and maintains.<sup>152</sup> In determining the willingness to discuss and then accept the alternative of reparations, the repairing group must come to terms with the leveling effect of reparations, thereby creating a tension between the morality of repairing those harmed and the possibility of sharing power and control with those it has and continues to oppress and disqualify.

As such, this is a difficult position for White America, and the record of the white congressional leadership reveals little effort or even interest in repairing or discussing reparations – the justifications, the continuing problems, the “pros” and “cons” of reparations, and the potential alternatives.<sup>153</sup> When legislation for a simple one-sentence official apology to African Americans was introduced in Congress in 1997, by Tony Hall, an

149. See CORNEL WEST, *RACE MATTERS* 27 (1993). West argues,

When whites, who continue to control the major institutions of American society, are in positions where their actions and attitudes shape the experiences of Black Americans, e.g., in the judiciary and the academic establishment, these biases translate into continued oppression of Blacks by whites. Thus, while African-Americans admittedly have gained access to majority institutions in recent decades, we are not, generally speaking, reveling in the experience.

*Id.*

150. See, e.g., Michael Jordan, *The NLRB Racial Discrimination Decisions, 1935-1964: The Empiric Process of Administration and the Inner Eye of Racism*, 24 CONN. L. REV. 55, 62 (1991) (chronicling the demise of slavery and its effect on the paternalistic institution of slavery); Timothy Davis, *Who's In and Who's Out: Racial Discrimination in Sports*, 28 PAC. L.J. 341, 351 (1997) (book reviewing KENNETH L. SHROPSHIRE, *IN BLACK AND WHITE: RACE AND SPORTS IN AMERICAN* (1996)) (illustrating that subconscious racism limits African Americans' opportunities in sports).

151. See Michael A. Fletcher, *For Americans Nothing Is Simple About Making Apology for Slavery: Congressman's Suggestion Draws Fire from All Sides*, WASH. POST, Aug. 5, 1997, at AO1 (noting that some White Americans continue to reject responsibility for slavery).

152. See Johnson, *supra* note 148; see also Levitt, *supra* note 124, at 13 (bemoaning the deliberate exploitation of African people).

153. See *infra* text Section II.



Ohio Democratic Congressman,<sup>154</sup> polls showed that 61% of those surveyed did not favor such legislation, although the African Americans surveyed favored the legislation two-to-one.<sup>155</sup> "Whites in America are already visualizing themselves as a racial minority. They fear their status is eroding and that people of color are usurping their traditional positions of power and privilege."<sup>156</sup>

These fears are evident in court decisions and legislative action.<sup>157</sup> Fearful of the approaching status of white Americans as a minority,<sup>158</sup> the Supreme Court has worked to include White Americans as potential victims worthy of protection of the same laws originally designed to protect African Americans and other racial "minorities."<sup>159</sup> One authority stated, "This bait-and-switch maneuver – using a multiminority context to assert the rights of whites as if they were no different from any other minority group – has become a signature of recent Supreme Court cases."<sup>160</sup>

For example, although the Court in *United Jewish Organizations v. Carey*<sup>161</sup> implied that white subgroups, such as the Hasidic Jewish plaintiffs,<sup>162</sup> might not be regarded as racial "minorities,"<sup>163</sup> the Court seemingly reversed its position sixteen years later in *Shaw v. Reno*.<sup>164</sup> The Supreme Court in *Shaw*, a white vote dilution case, included whites

154. H.R. Con. Res. 96, 105th Cong. (1997).

155. See Iijima, *supra* note 121, at 389.

156. *Id.* at 415. "Indeed, the beginnings of using multiminority conflict to assert the rights of whites as if they were no different from other minority groups has become the signature of recent Supreme Court racial jurisprudence." Chris K. Iijima, *The Era of We-Construction: Reclaiming the Politics of Asian Pacific American Identity and Reflections on the Critique of the Black/White Paradigm*, 29 COLUM. HUM. RTS. L. REV. 47, 77 (1997) [hereinafter *Era of We-Construction*].

157. See Alexandra Natapoff, Note, *Trouble in Paradise: Equal Protection and the Dilemma of Interminority Group Conflict*, 47 STAN. L. REV. 1059, 1060-62 (1995) (emphasizing these fears found in Equal Protection and employment discrimination cases).

158. "By the year 2050, people of color will make up approximately one-half of the United States' population, with people of Hispanic descent constituting the largest racial minority by 2010." *Id.* at 1060.

159. See Iijima, *supra* note 121, at 415-16; see also Natapoff, *supra* note 157, at 1062, 1066. Note that I place the term "minority" in quotation marks – while the term is traditionally used to define people of color and other disadvantaged groups, I do not agree with the "lesser" status that the term implies and applies to the groups it identifies.

160. Natapoff, *supra* note 157, at 1072 (citing *City of Richmond v. J.A. Croson Co.*, 488 U.S. 469 (1989)).

161. *United Jewish Organizations v. Carey*, 430 U.S. 144 (1977) (plurality opinion).

162. See *id.* at 152.

163. See *id.* at 165-66; cf. *United Jewish Organizations*, 430 U.S. at 185 (Burger, C.J., dissenting) (stating that the term "whites" encompasses several ethnicities and national origin groups). The interest of all "whites" is not "substantially similar." *Id.*

164. *Shaw v. Reno*, 509 U.S. 630 (1993).

as potential victims of racial discrimination when it argued for the elimination of all overt racial classifications<sup>165</sup> as part of the effort to develop and maintain a multiracial, colorblind democracy.<sup>166</sup> The notion that whites should be included as potential victims to be protected was recently supported by the Court's decision in *Adarand*, as white plaintiffs successfully challenged a federal program aimed at promoting subcontracting with small businesses controlled by "minority" or other disadvantaged individuals.<sup>167</sup>

In response to this reaction by the Supreme Court, one author declared,

[T]he Court's current equal protection doctrine exploits the increasingly multiracial character of American society to the detriment of minority groups. . . . [T]he Court uses the image of a thoroughly multiracial America to recast whites as just another group competing with many others. By transforming whites into a victim group with the same moral and legal claims as any other minority group, the Court gives intuitive plausibility to its attack on racial set-asides, majority-minority voting districts, and affirmative action programs that burden white economic interests. Put bluntly, the nation's new awareness of minority conflict has translated, not into tools to improve minority participation, but into stronger protections for white entitlements.<sup>168</sup>

The manipulation of rules to maintain an unjust or ill-acquired status quo is unjust. While resentment in the repairing group may lead to further maneuverings and division between the groups rather than cohesion,<sup>169</sup> this is no defense to a morally just solution, and the concerns of the prospectively repaired group must weigh in significantly to the resolution equation.<sup>170</sup> Without an admission of guilt and at minimum an offi-

165. *See id.* at 643-44.

166. *See id.*; *see* *Rice v. Cayetano*, 120 S.Ct. 1044, 1057 (1999); *New Jersey v. New York*, 523 U.S. 767, 828 (1998); *Bush v. Vera*, 517 U.S. 952, 1068, 1071-77 (1996); *Johnson v. DeGrandy*, 512 U.S. 997, 1030 (1994); *Board of Educ. of Kiryas Joel Village School Dist. v. Grumet*, 512 U.S. 687, 728 (1994); *Edmonson v. Leesville Concrete Co., Inc.*, 500 U.S. 614, 630-31 (1991); *City of Richmond v. J.A. Croson Co.*, 488 U.S. 469, 513-14 (1989); *Edwards v. Aguillard*, 482 U.S. 578, n.6 (1987).

167. *Adarand Constructors, Inc. v. Peña*, 515 U.S. 200, 227-28 (1995) (stating that racial classifications must be reviewed under a strict scrutiny standard).

168. Natapoff, *supra* note 157, at 1061-62.

169. *See Shaw*, 509 U.S. at 657 (asserting how "[r]acial gerrymandering. . . may balkanize [people] into competing racial factions"); *Hughes*, *supra* note 69, at 1065.

170. *See generally Robinson*, *supra* note 52, at 45-46 (commenting that concerns of the group being repaired must be heard).

cial apology, there can be little meaningful accomplishment of reduced racial tensions that persist.

### B. *Counterattacks of "Reverse Discrimination"*

Instead of working to repair past wrongs and absorb African Americans, many have turned to degenerative terminology and efforts to weaken the strength and forward progress of African Americans.<sup>171</sup> The tables are often turned to blame African Americans for their progress by asserting claims of being unqualified, and requests for reparations are termed reverse discrimination and their proponents racists.<sup>172</sup> These counterattacks seemingly aim to maintain the status quo discrimination.

Some have called the reaction of White America typical in the phenomenon called "the angry white male."<sup>173</sup> Cornel West<sup>174</sup> argues,

In white America, cultural conservatism takes the form of a chronic racism, sexism, and homophobia. . . . Like all conservatisms rooted in a quest for order, . . . America fans and fuels the channeling of rage toward the most vulnerable and degraded members of the community. For White America, this means primarily scapegoating black people. . . .<sup>175</sup>

Derrick Bell writes,

Lulled by comforting racial stereotypes, fearful that blacks will unfairly get ahead of them, all too many whites respond to even the most dire reports of race-based disadvantage with either a sympathetic headshake or victim-blaming rationalizations. Both responses lead easily to the conclusion that contemporary complaints of racial discrimination are simply excuses put forward by people who are unable or unwilling to compete on an equal basis in a competitive society. . . .

On the one hand, contemporary color barriers are certainly less visible as a result of our successful effort to strip the law's endorsement from the hated Jim Crow signs . . . . Indeed, the very absence of

171. See Jabeen Bhatti, *UVa. Students Rally for Affirmative Action Amid Debate*, WASH. TIMES, Oct. 7, 1999, at A1 (providing that "reverse discrimination" diminishes an African American's progress); Christine Walker, *Panel's Report Backs Policies Florida the Next Battleground in Controversy*, SUN-SENTINEL, May 22, 1999, at 1B.

172. See Robert A. Levy, *An Equal Protection Analysis of the Davis-Bacon Act*, 1995 DET. C.L. MICH. ST. U.L. REV. 973, 985-86 (stating that reparations cannot be seen as reverse discrimination).

173. Chappell, *supra* note 46.

174. Cornel West is a renowned historian and scholar and is a professor in Harvard University's Afro-American Studies Department.

175. WEST, *supra* note 149, at 27.

visible signs of discrimination creates an atmosphere of racial neutrality and encourages whites to believe that racism is a thing of the past. On the other hand, the general use of so-called neutral standards to continue exclusionary practices reduces the effectiveness of traditional civil rights laws, while rendering discriminatory actions more oppressive than ever. . . .

Modern discrimination is, moreover, not practiced indiscriminately. Whites, ready and willing to applaud, even idolize black athletes and entertainers, refuse to hire, or balk at working with, blacks. Whites who number individual blacks among their closest friends approve, or do not oppose, practices that bar selling or renting homes or apartments in their neighborhoods to blacks they don't know.<sup>176</sup>

Both West and Bell suggest that the counterattacks and resulting hypocrisy that emerge from the tension between reparations and its leveling effect do little to solve the racial problems that continue in this country.<sup>177</sup> Absorption of African Americans must be complete and unequivocal, and an apology and some form of reparations are good starting points for today's efforts.

### C. *Difficulty Connecting Past to Present*

Part of White America's reluctance to absorb African Americans and grant reparations stems from not merely its unwillingness to acknowledge past wrongdoing but its unwillingness to associate at least some of the present racial ills to its past injustice.<sup>178</sup> To begin, some ignore the fact of present discrimination today.<sup>179</sup> These naysayers might argue that the laws have changed, sufficiently eliminating any official discrimination.<sup>180</sup> The unofficial, subtle discrimination that exists is minimal and insignificant at best, attributable to personal preference and impossible to discharge.<sup>181</sup>

176. DERRICK BELL, *FACES AT THE BOTTOM OF THE WELL: THE PERMANENCE OF RACISM* 4-6 (1992).

177. See WEST, *supra* note 149, at 27; BELL, *supra* note 176, at 4-6.

178. See Robinson, *supra* note 52, at 44 (emphasizing that American society has difficulty accepting responsibility for slavery and its consequences).

179. Two studies contend that "most whites believe that serious anti-black discrimination does not exist in the United States today and view outspoken African Americans as making illegitimate demands for social change." Johnson, *supra* note 148.

180. See generally Milloy, *supra* note 122, at B1 (quoting former Tennessee Governor Lamar Alexander as saying "We [apologized] when we passed the 13th and 14th amendments").

181. Chris K. Iijima describes the more subtle racism of the present. According to Iijima, there are:

Similarly, White America has refused to acknowledge the role of "whiteness"<sup>182</sup> in benefiting some, or "blackness" in hampering others.<sup>183</sup> White Americans fail to acknowledge the advantage they have gained in being white.<sup>184</sup> Randall Robinson, the author of *THE DEBT: WHAT AMERICA OWES TO BLACKS*, argues, "Denial not only causes those cocooned to see no evil through the opaque walls of their shells but, of-

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. . . two major species of American racism. There is the more familiar, obvious and virulent kind manifested by those human vermin who wear the sheets over their heads and swastikas on their arms, who desecrate and burn churches, and commit crimes against people of color solely because they are of color. . . . But the second kind of racism, equally as virulent but not as obvious, that white America will not admit to, exists in myriad of normative attitudes rooted in racial stereotypes. It is the racism that manifests in a proclamation of "colorblindness" without the commitment to change the societal conditions that would make the proclamation real. Indeed, the proclamation perpetuates its opposite . . . . "Unfortunately, the colorblind myth of racial vision confuses the ideal of an end to racial hierarchy with what already exists. That is, the prescriptive ideal of a 'colorblind' society in which racism and White supremacy are eradicated, has been transformed by judicial fiat into 'a condition of societal denial' creating the illusion that racial hierarchy has been already eliminated. Indeed, 'denial is a pervasive symptom of contemporary American racism.' And, of course, the denial of reality merely perpetuates the condition of racial subordination."

Chris K. Iijima, *Race as Resistance: Racial Identity as More Than Ancestral Heritage*, 15 *TOURO L.REV.* 497, 507-08 (1999) [hereinafter *Race as Resistance*].

182. One authority defined this term:

Whiteness is a transparent quality when whites interact with whites in the absence of people of color. Whiteness attains opacity, becomes apparent to the white mind, only in relation to, and contrast with, the "color" of nonwhites. . . . Race is undeniably a powerful determinant of social status and so is always noticed, in a way that eye color, for example, may not be. However, whites' social dominance allows us to relegate our own racial specificity to the realm of the subconscious. Whiteness is the racial norm. In this culture the black person, not the white, is the one who is different. The black, not the white, is racially distinctive. Once an individual is identified as white, his distinctively racial characteristics need no longer be conceptualized in racial terms. . . .

Barbara J. Flagg, "Was Blind, But Now I See": *White Race Consciousness and the Requirement of Discriminatory Intent*, 91 *MICH. L. REV.* 953, 970-71 (1993).

183. University of Maryland political scientist, Ronald Walters asserts that "[t]here is a direct line in terms of the consequences many Black people still suffer in America today because of slavery." Robinson, *supra* note 52, at 44.

184. See Pamela J. Smith, *Reliance on the Kindness of Strangers: The Myth of Transracial Affinity Versus the Realities of Transracial Educational Pedism*, 52 *RUTGERS L. REV.* 1, 96 n.412 (1999) (discussing the whites' ignorance of their unspoken racial privilege); see also Kimberle Crenshaw, *Playing Race Cards: Constructing a Pro-Active Defense of Affirmative Action*, 16 *NAT'L BLACK L.J.* 196, 204-07 (1999) (describing an undercover ABC network investigation in which two similarly situated men, one white and one African American, were sent to live in St. Louis for a three week-period). The men performed identical tasks and various errands around the city. However, the white man was treated in a friendly, cheerful manner while the African American man was often ignored, lied to, or harassed. See *id.*

tener than not, obliges the self-deluded to paint pleasing murals of faux reality upon the walls."<sup>185</sup>

What has resulted is a neo-conservatism, in which White America today attempts to distance itself from both the "sins of slavery" and of its forefathers, in an effort to deny responsibility for the past and present problems associated with race.<sup>186</sup> Opponents of African American reparations contend that slavery and past injustices by White Americans were not conducted by individuals living today, but rather by individuals long dead.<sup>187</sup> Henry Hyde, Republican congressman from Illinois and Chair of the House Judiciary Committee, several years ago, stated,

The notion of collective guilt for what people did [200-plus] years ago, that this generation should pay a debt for that generation, is an idea whose time has gone. I never owned a slave. I never oppressed anybody. I don't know that I should have to pay for someone who did [own slaves] generations before I was born.<sup>188</sup>

However, this argument, proponents of African American reparations assert, does not comport with other comparative issues, including the national debt, for which all Americans must continue to pay despite its partial creation by other generations.<sup>189</sup> In addition, these arguments of the injustice of shifting generational responsibility were ignored when reparations for Japanese Americans were paid by all U.S. citizens through taxes.<sup>190</sup> In 1988, one-third of the tax-paying population, who contributed to reparations that were given to interned Japanese Americans, were born after World War II.<sup>191</sup> And, those taxed in 1988 helped pay for Japanese American reparations whether or not they supported the government's mandated internment.<sup>192</sup>

Opponents also argue that African Americans today were never slaves and did not directly experience the injustices of slavery and its effects and thus are not entitled to any form of reparations.<sup>193</sup> However, the effects

185. RANDALL ROBINSON, *THE DEBT: WHAT AMERICA OWES TO BLACKS* 166 (2000).

186. See Verdun, *supra* note 75, at 628 (1993). See generally Milloy, *supra* note 122, at B1 (stating that the adamant opposition by white legislators to a public apology or reparations for African Americans because of slavery is the result of an unwillingness to hear the truth about the suffering African Americans endured at the hands of white slave owners).

187. See Verdun, *supra* note 75, at 628; Merida, *supra* note 117, at C1.

188. Merida, *supra* note 117, at C1.

189. See Robinson, *supra* note 52, at 49.

190. See Albert E. Cohen, *What Were They Thinking*, MILWAUKEE J. & SEN., Aug. 4, 1999, available in 1999 WL 21525473 (declaring that the United States is forcing future generations to pay for a national debt built on past mistakes).

191. See Robinson, *supra* note 52, at 49.

192. See *id.*

193. See Verdun, *supra* note 75, at 628.

of slavery are still prevalent and other more recent bases of reparations have been highlighted by African American reparations advocates.<sup>194</sup>

#### D. *Fear of High Costs*

The reluctance to absorb African Americans, evident in White America's lack of acknowledgement of the present realities as an extension of past and perpetuated wrongdoing, becomes more adamant when the extent of monetary compensation is considered.<sup>195</sup> Probably an overriding factor in the development of reparations is the potential cost of the reparations bill to taxpayers.<sup>196</sup> While reparations to Native Americans and Japanese Americans have been achieved, reparations to African Americans could possibly amount to trillions of dollars.<sup>197</sup>

There are 22 million African Americans in the U.S.<sup>198</sup> When one considers today's market value of 40 acres and a mule, the total projected bill of reparations is quite high.<sup>199</sup> While figures on the amount of reparations differ, Dorothy Benton Lewis, the leader of Black Reparations Now, says the U.S. government owes descendants of black slaves several trillion dollars.<sup>200</sup>

Nonetheless, no amount can assuage the fact and extent of the injustice to African Americans. The fact that the bill is so high is evidence of the severity of the ill and a reminder of the urgency of the need to repair. And, whatever reparations or alternatives are considered, more and complete efforts need to address present persisting racial ills and the anger and frustration that have resulted from the extensive delay.

#### E. *Lack of Change*

The lack of leadership, fear, and ignorance in this new wave of neo-conservatism lead many to argue that no basic level of change has emerged from the days of slavery to the present.<sup>201</sup> Some may argue that the United States is impossibly struggling against the permanency of ra-

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194. See discussion *infra* Section II.

195. See Tom Bradley, *Slave Wages: Tallying the Take for the Residual Effects of 300 Years of Forced Labor*, SAN DIEGO UNION-TRIBUNE, Mar. 22, 1994, at B5 (pointing to slavery's "lasting negative effects on [African American] people here in America").

196. See *id.*

197. See *id.*

198. See *id.*

199. See *id.*

200. See Milloy, *Reparations Don't Start at the IRS*, WASH. POST, available in 1999 WL 17008571. Benton arrives at the 'trillions' figure base by calculating interest accumulated on 40 acres and a mule. See *id.*

201. See generally BELL, *supra* note 176, at 92 (asserting that racism is permanent).

cism.<sup>202</sup> Because of the unwillingness of many in positions of power to share their position in spite of the wrongdoing that was invoked to achieve and maintain that position,<sup>203</sup> past or present, Derrick Bell argues that racism is permanent and will never subside in this country: “[R]acism in America is not a curable aberration – as we all believed it was at some earlier point. Rather, it is a key component in this country’s stability. . . . [R]acism is permanent.”<sup>204</sup>

More and more meaningful steps must be taken by White America to resolve the issue of race in America. These steps will be difficult, but recognition and resolution of the underlying problems could make the United States a morally and economically healthier land. Descendents of those previously wronged become victims themselves if the wrong is not addressed.

#### IV. BLACK AMERICA

For African Americans, it is often easy to place sole blame for many of the problems of race and the perpetuation of those problems on White America generally. However, the second root of race problems in the United States is attributed at least in some part to African Americans themselves.<sup>205</sup> The justification for this blame centers in the African American community’s growing division.<sup>206</sup>

##### A. *The Difficulty of the Individual vs. Group Perspective in the Integration vs. Nationalism Debate*

The history of African American reparations reveals the existence of diversity within the African American perspective in the past.<sup>207</sup> Reparations was the advocacy flag of the nationalists in their internal struggle with integrationists, who argued that ending the old *de jure* discrimination was sufficient, and now people of African descent have to be able to work and cooperate within the system.<sup>208</sup> The reparationists argued that

202. See generally *id.*

203. See Levitt, *supra* note 124, at 2 ; Johnson, *supra* note 148.

204. BELL, *supra* note 176, at x.

205. See Sherry B. Ortner, *Anthropology in Public*, DISSENT, Oct. 1, 1999, at 106, available in 1999 WL 12054405 (book review); see, e.g., Teresa Watanabe, *Sermons on Islam Anger Black Muslims Religion: They Charge ‘Prosperity Preacher’ with Distorting Beliefs and Dividing African Americans. Backers Say He is Being Taken Out of Context*, L.A. TIMES, Mar. 11, 1999, at B1 (pointing to “brawls between [African American] Muslims and Christians”).

206. See Ortner, *supra* note 205, at 106; see, e.g., Watanabe, *supra* note 205, at B1.

207. See Magee, *supra* note 1, at 868.

208. See *id.* at 869-74.



America had a duty to remedy the past and maintain measures to equalize a society that was more than superficially divided.<sup>209</sup>

The two camps differed primarily in their particular views of the dominance of the individual versus that of the group.<sup>210</sup> Integrationists focused on the individual.<sup>211</sup> For integrationists, "[t]he war [was] seen, in essence, as a war between individuals with different attributes, of which race [was] only one. Equality exist[ed] as long as the rules of the game [were] fairly and even applied to everyone, without regard to race."<sup>212</sup> The integration theory embodied the outcome of African American assimilation to white culture and norm<sup>213</sup> and tended to be the advocated proposition of the dominating entity,<sup>214</sup> which was the European perspective in the African American reparations context.<sup>215</sup>

On the other hand, nationalism tended to be the theory of the submissive entity.<sup>216</sup> Nationalists focused on the group and the collective conditions and experiences faced by African Americans.<sup>217</sup> Proponents of nationalism rejected notions of "Black pathology and white supremacy" that often accompanied integration theory.<sup>218</sup> One author argued, with regard to the importance of group experience in the reparations movement,

[T]he European-American individualist world view (the dominant perspective) [was seen] as the obstacle to a reparations program, because the value placed on individualism [was] so entrenched in the dominant perspective that it [could not] yield to foreign concepts such as group entitlements or group wrongs. Dr. Linda James Myers describe[d] the Afrocentric conceptual system characteristics as collectivism, group ownership, and ethical communalism, while the characteristics of the dominant conceptual system [were] materialism, competition, and individualism.<sup>219</sup>

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209. See generally *id.*, at 868-73.

210. See *id.*, at 868.

211. See *id.*

212. *Id.*

213. See Magee, *supra* note 1, at 868.

214. See *id.*

215. See *id.* (referring to the assimilation of Blacks to the white/European perspective, which is considered the dominating perspective); see also Ozer, *supra* note 54, at 495.

216. See generally Magee, *supra* note 1, at 870.

217. See *id.* at 868.

218. *Id.* at 869.

219. Ozer, *supra* note 54, at 495 (citations omitted); see also *A COMMON DESTINY*, *supra* note 19, at 153-54 (emphasizing the struggle between the "individual" versus the "group" perspective in the debate between dominant versus minority entities).

Largely because of its less threatening and complimentary nature to the dominant entity's policies, integration gained the most widespread acceptance.<sup>220</sup> Nonetheless, despite integration's popularity, many have criticized the ineffectiveness of the theory and have pointed to other alternatives, such as reparations.<sup>221</sup> "[T]wenty years of integration data starkly refute the promise of integration-based politics as the sole means of improving the quality of experience and results for the mass of African-Americans."<sup>222</sup>

The failure of integration has encouraged the re-emergence of nationalism and reparations as a legitimate solution to the racial issues existing within the United States.<sup>223</sup> Particularly for African American reparations, integrationism, being rooted in the individual, has been viewed as having little appeal or effectiveness in dealing with the African American quest as a whole.<sup>224</sup>

Hence, with the growing frustration experienced by African Americans generally, the alternative of reparations as a solution for past and present racial ills continues to gain momentum. However, the continuing growth in the diversity of opinion and perspective within the African American community must be coalesced for reparations to become a feasible and acceptable alternative, noticed and entertained in the larger political arena.

#### B. *Disunity in the African American Community*

The integrationist versus nationalist debate is only part of the historic and present disunity and dissension in the African American community.<sup>225</sup> The similarity of experience of African Americans after the Middle Passage helped to cement a unity that moved African Americans from slavery through the Civil Rights Movement to overcome common barriers of racism, discrimination, and oppression.<sup>226</sup> This unity of experience, prompting unity of action, was one of the great impetuses of the

220. See Magee, *supra* note 1, at 868.

221. See *id.* at 871.

222. *Id.* at 868-69.

223. See ROBINSON, *supra* note 185, at 8; Magee, *supra* note 1, at 869; see also Verdun, *supra* note 75, at 666 (providing that the solution of affirmative action crippled by the individualism of the dominant perspective fails to achieve desired racial symmetry).

224. See Verdun, *supra* note 75, at 666-67 (noting that the dominant perspective of individualism has neutralized affirmative action and blames African Americans for failing to assimilate). Such an attack on affirmative action has frustrated African Americans "and with little hope for relief, [has African Americans] looking for another means of empowering [their] community." *Id.* at 66.

225. See discussion *infra* Section IV.

226. See *Fresh Air: Entertainment*, Why, Inc. Production, Feb. 26, 1999 (interviewing composer and musician, Isaac Hayes, who recalled that his inspiration for one of his most

Civil Rights Movement that inspired the African American community and affected the nation and world.<sup>227</sup> But, one of the goals of the Civil Rights Movement was to expand the experience and potential socio-economic and political gains of African Americans.<sup>228</sup>

Today, African Americans can be found on many different socio-economic, professional, and influential levels.<sup>229</sup> Whereas in the pre-Civil Rights Movement days African Americans could be homogeneously categorized because their experiences and backgrounds were similar, such categorization is much more difficult today.<sup>230</sup> The experience of African Americans is growing more dissimilar as many barriers are overcome, although some less obvious barriers persist or replace old ones, barriers are not so common today, or at least the perception of those barriers is viewed with greater diversity.<sup>231</sup> While diversity within the Black diaspora is applauded and encouraged, this diversity has led to different perceptions of the problems – if problems are considered existent – and the solutions relevant and extensive enough to effectively and completely address those problems.

Differing policy perspectives can be traced as far back as the beginnings of slavery, when African tribes sold members of other African tribes into European slavery.<sup>232</sup> Then during slavery, the “house Negroes” had different philosophies from their “field Negro” counterparts.<sup>233</sup> Differences in the philosophies of Dr. King and Malcolm X also

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famous songs, “Soul Man”, came after watching riots in Detroit and was intended to capture the idea of unity within the African American community).

227. See *id.*; Wayne Risher, *Fire Lit in '58 Still Burns for Retiring Suggs*, THE COMMERCIAL APPEAL, Nov. 25, 1999; cf. Karen A. Davis, *Black History Month Conversation with . . . NAACP Leader Clifford Montiero*, THE PROVIDENCE J., Feb. 2, 1999.

228. The late Dr. Martin Luther King, Jr.'s “I Have a Dream” Speech reviews some of the goals of Dr. King as well as the Civil Rights Movement, including political, social, and economic inclusion. See Martin Luther King, “I Have a Dream” Speech Delivered at the Lincoln Memorial (Aug. 28, 1963) *reprinted in* A TESTAMENT OF HOPE 217, 219 (James M. Washington ed., 1986).

229. See A COMMON DESTINY, *supra* note 19, at 271-324.

230. See *id.* at 168-71, 271-324.

231. See *id.* at 168-71.

232. See generally Steven Mintz, *Excerpts from Slave Narratives: A European Slave Trader John Barbot, Describes the African Slave Trade (1682)* (visited Mar. 14, 2000) <<http://vi.uh.edu/pages/mintz/primary.htm>>.

233. Christopher J. Arias-Pirano, Recent Publication, *Malcolm X: Speeches at Harvard*, 28 HARV. C.R.-C.L. L. REV. 252, 253 n.6 (1993). Malcolm X described the differences between “house Negroes” and “field Negroes” and identified himself as a “field Negro.” *Id.*

became evident, despite the fact that both experienced the same racial issues and attacked the same injustices of their time.<sup>234</sup>

Presently, we see a rise in the number of African American representatives in the Republican Party, most notably Clarence Thomas, Colin Powell, J.C. Watts, and Alan Keyes. The increase of representation in the Republican Party contrasts what has traditionally been the party for African Americans - the Democratic Party.<sup>235</sup> And today, the discussion of reparations within the African American community seems to parallel the historic dissension and disunity of the community.

### C. *Dissension within the Black Caucus in the African American Reparations Debate*

With regard to African American reparations, many argue a significant problem for the African American reparations movement is that proponents of reparations must first acquire the support of wavering African Americans on the issue.<sup>236</sup> One authority stated, "Not even all the members of the Black Caucus are on board. In fact, two black Democrats on the Judiciary Committee - Mel Watt of North Carolina and Bobby Scott of Virginia - have declined to follow their Democratic leader [Conyers]." <sup>237</sup> Without an expansive and consistent front within the Black community, particularly the lack of leadership, African American reparations, with already very little to no support from the White American community, has little potential for enactment.

### D. *Young-Old Dichotomy and Its Effect on Plaintiff Identification and Apathy*

Preventing further efforts toward racial progress and reparations is the increase of disunity within the African American community between the young and the old.<sup>238</sup> Not all young African Americans have a strong knowledge of history and an understanding of the importance of his-

234. One person described the difference between Dr. Martin Luther King, Jr. and Malcolm X as, "[T]wo black men trying to get to the same end result but taking two different roads." Mark Sommer, *Stepping Up to the Plate: Paul Robeson Play Makes a Pitch for Integrating Baseball Differently in the 1940s*, BUFFALO NEWS, Feb. 18, 2000.

235. See generally Peter J. Spiro, *The Citizenship Dilemma*, 51 STAN. L. REV. 597, 612 (1999) (reviewing ROGERS M. SMITH, *CIVIC IDEALS: CONFLICTING VISIONS OF CITIZENSHIP IN U.S. HISTORY* (1997)).

236. See Robinson, *supra* note 52, at 46.

237. Merida, *supra* note 117, at C1.

238. See Don O'Briant, *Ball to Share Earnings with Slave Descendants*, THE ATLANTA CONST., Jan. 14, 1999, at E2, available in 1999 WL 3745016; Patricia Swanson, *Bond Says Supremacy Still the Foe: NAACP Chief Visiting Evansville on Monday*, EVANSVILLE COURIER & PRESS, Jan. 15, 1999, available in 1999 WL 9404088.

tory.<sup>239</sup> African American young people must merely read and/or hear stories about the experiences that their parents, grandparents, and other forebearers faced, and they have a different experience and a unique set of race issues from that of their predecessors.<sup>240</sup> The experiences and issues of the new and coming generations of African Americans seemingly warrant a different urgency and respect for issues of race, not always looked upon favorably, or more importantly understood, by those of the older generation.<sup>241</sup>

For reparations, this age dichotomy has two important ramifications. First, practically speaking, a key element in the plaintiff identification factor of reparations is the closeness of the request for reparations to the actual injury.<sup>242</sup> While a slave might have a cause of action requiring reparations, his or her children, grandchildren, etc., will have less of an opportunity to be repaired, even though they still feel the effects or after-effects of that slavery. This limitation is in spite of the persuasive argument that the situation and time period in which slavery existed prevented the immediate request and/or granting of reparations through the courts or legislative bodies as a possible solution.<sup>243</sup> In other words, when the evidence and parties needed for direct remedy were strongest and present, so too were the ideological, legal, and political barriers necessary to overcome to achieve that remedy.<sup>244</sup> While many are working to base reparations on more recent injustices,<sup>245</sup> the time factor continues to emerge as a primary issue in the African American quest for reparations.<sup>246</sup>

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239. See O'Briant, *supra* note 238, at E2; Swanson, *supra* note 238.

240. See, e.g., Mary Rasmussen Podkopacz & Barry C. Feld, *Judicial Waiver Policy and Practice: Persistence, Seriousness of Race*, 14 *LAW & INEQ.* 73, 116-18 (1995) (discussing the impact of race on African American youth arrest rates); Coramae Richey Mann, *Minority View of Juvenile Justice*, 51 *WASH. & LEE L. REV.* 465, 465 (1994) (explaining that African American youth are over-represented in the Juvenile Justice System).

241. Young African Americans face a more subtle racism than their parents and foreparents. This reality is within a more global, technological, fast-paced, and complex context.

242. See John C.P. Goldberg & Benjamin C. Zipursky, *The Moral of MacPherson*, 146 *U. PA. L. REV.* 1733, 1771-72 (1998) (providing different tort theories and listing several factors, including the closeness of the injury, that should be considered when determining damages and reparations).

243. See Magee, *supra* note 1, at 903 (stating that African Americans should not be barred from bringing claims of discrimination simply because the injury happened years ago).

244. See *id.* at 890-91.

245. See Saul Levmore, *Changes, Anticipations, and Reparations*, 99 *COLUM. L. REV.* 1657, 1660-61 (1999).

246. However, although this country is four hundred years removed from slavery, the time period of Jim Crow laws and systematic discrimination is not so far removed, increas-

The other important ramification of age diversity is the diminished understanding, commitment, and importance young people will place on issues of race.<sup>247</sup> This reality, along with the difficulty of uncovering overt and covert forms of racism today, will result in fewer efforts of young African Americans to promote issues of racial importance, such as African American reparations, and challenge (much less even recognize) surfacing racial injustices. The issue of age diversity plays an important role in the feeling of lack of ownership for reparations among African American young people and the requisite support, rallying, and endorsement needed to move Congress to begin thinking about reparations possibilities and alternatives.<sup>248</sup> Apathy and a "lax mentality" with regard to race issues has replaced not so much a "protest mentality," but somewhat of a constructive anger that might be termed "revolutionary" or "militant."<sup>249</sup> This divide has served to exaggerate differences between African Americans based on age, socioeconomic status and lifestyle, political belief, definition and identity, etc. Such a divide augments already existent disunity and dissension.

#### E. *Difficulty of Administering Race*

The issue of age diversity leads to another practical problem in the African American reparations movement context – the difficulty of defining the parameters of race. Reparations is compensation for a group injury as opposed to an individual injury.<sup>250</sup> However, the challenge for ad-

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ing the possibility of finding plaintiffs with a cause of action requiring reparations, using a different notion of original injury than the traditional focus on slavery. This source of original injury and proximity of potential plaintiffs to the injury remains a possibility for discussion, if Congress could get to the point of looking at alternatives for African American reparations.

247. See O'Briant, *supra* note 238, at E2 (referring to the youth's lack of understanding about the struggles of civil rights).

248. See, e.g., J. Morgan Kousser, *Shaw v. Reno and the Real World of Redistricting and Representation*, 26 RUTGERS L.J. 625, 688 (1995) (illustrating a lack of ownership and responsibility yielded by African Americans with regard to voting). "It is the children of the black poor, the bulk legatees of American slavery, that we must salvage – or, in our time, we will have marked time but accomplished nothing." ROBINSON, *supra* note 185, at 237-38.

249. "Militant black nationalism" is defined as "a response to African American frustration with the status quo." Yonat Shimron, *Questions of Faith*, THE NEWS & OBSERVER, Dec. 3, 1999, at F1, available in 1999 WL 29850608. Some are fearful of being labeled militant. See David Fryson, *Continuing the Dialogue: Progress in Discussion on Race Will Require Openness*, THE CHARLESTON GAZETTE, Mar. 29, 1999, at P5A, available in 1999 WL 6719081.

250. "Individuals can never be victims of 'historic injustices'; only long suffering groups can qualify." 137 CONG. REC. H8337-01 (daily ed. Oct. 23, 1991) (statement by Major R. Owens).

ministering reparations is determining the elusive concept of race and defining who is a member of this injured group.

In the African American community, there are varying hues of blackness.<sup>251</sup> In addition, there are many African Americans who do not necessarily identify as such but would rather be considered more in their multicultural, individual, or even "American" context.<sup>252</sup> There are also native Africans, Caribbeans, other foreign members of the Black diaspora, and those who have recently been naturalized as American citizens.<sup>253</sup> Finally, the African American community is becoming much more economically diverse, making the impact of the past less obvious for some African Americans than for others, and present race issues seemingly based on factors other than slavery, its effects, or even race in general.<sup>254</sup> These factors lessen the ability to identify an injured party or group worthy of African American reparations.

The difficulty with remedying the past discrimination is determining the definition and confines of race and administering the remedies.<sup>255</sup> "[T]he concept of race is central both to identifying and to rectifying the effects of prejudice. . . . [The] dichotomy between the importance of race classification to anti-discrimination law and its fundamental indeterminacy creates. . . a core dilemma of modern race-conscious law: the difficulties of how we 'administer race.'"<sup>256</sup>

Others argue the absurdity of this administration of race.<sup>257</sup> Armstrong Williams, an African American conservative and employee of a D.C.-based public-relations firm,<sup>258</sup> asks "Who are the descendants of slaves and who are not? . . . It would literally pay to be black. Everybody and their momma would claim they were black."<sup>259</sup> These are difficult questions for the African American community, but they must be addressed prior to further discussions of the possibility of reparations.

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251. See Smith, *supra* note 184, at 87.

252. See, e.g., *id.*

253. The "Black Diaspora" includes all those around the world whose ancestors originated in Africa, all of whom might be considered potential recipients of African American reparations, depending on the limitations proscribed. "Diaspora" is defined as "the dispersion of the Jews among the Gentiles . . . in the eighth and sixth century B.C." and is attributed to "any group of people similarly dispersed." THE CONCISE OXFORD DICTIONARY 322-23 (8th ed. 1990).

254. See A COMMON DESTINY, *supra* note 19, at 168.

255. See Christopher A. Ford, *Administering Identity: The Determination of "Race" in Race-Conscious Law*, 82 CAL. L. REV. 1231, 1231-32, 1239 (1994).

256. *Id.* at 1231.

257. See Merida, *supra* note 117, at C1.

258. See Williams description *supra* note 15.

259. Merida, *supra* note 117, at C1.

## F. *Inconsistent Goals of the African American Community*

In addition to the diversity discussed, the existing diversity leads to an inconsistent, unidentified goal and ensuing tensions. Americans – whether it be the government, white citizens, or “minority” or African American citizens – do not have a clear idea of what is being achieved.<sup>260</sup> Thus, different ideas as to the goals set have led to different, often conflicting, efforts thereby creating tension.

The term “colorless,” or “colorblind,” society and “melting pot” have been bantered around for years.<sup>261</sup> These terms connote the aim of earlier immigrants to assimilate into American society as a symbol of advancement.<sup>262</sup> However, because this assimilation meant adopting White American culture<sup>263</sup> rather than a perceived mixture of their own culture with others, many people of color, including African Americans, have begun to focus on different concepts – a “colorful” society and a “stewpot.”<sup>264</sup> These terms reveal a desire for a stronger group identity as part of this concept of an “American society.”<sup>265</sup> But, until these ideas

260. The ongoing debate centers on a “colorblind,” or “colorless,” society vs. a “colorful” society, or the “melting pot” analogy vs. the “stewpot,” or “salad bowl,” ideal. See CURRENT, *supra* note 4, at 894 (defining “melting pot”).

261. See, e.g., Shaw v. Reno, 509 U.S. 630, 641-42 (1993); CURRENT, *supra* note 4, at 894; Natapoff, *supra* note 157, at 1061, 1072.

262. See CURRENT, *supra* note 4, at 894; see also Natapoff, *supra* note 157, at 1061, 1072; cf. United Jewish Organization v. Carey, 430 U.S. 144, 187 (1977) (Burger, J., dissenting).

263. One authority stated,

From the dominant community's perspective, 'Americanization' is expressed as a preference in immigration policy for immigrants from cultures like the Anglo-Saxon culture, on the grounds that such cultures assimilate faster into the American dominant culture. The utilitarian justification is that the process of assimilating such groups would be less stressful on the host group and would result in less noticeable social conflict. From the minority perspective, the utilitarian argument is often combined with ethnocentrism, which sometimes spills over as intolerance.

Sylvia R. Lazos Vargas, *Destructing Homo[Geneous] Americanus: The White Ethnic Immigrant Narrative and Its Exclusionary Effect*, 72 TUL. L. REV. 1493, 1507 (1998).

264. One authority wrote,

The civil rights movement, and the pervasive liberal ideology of equal opportunity and integration that grew out of it, established new notions of a colorblind society and of the declining significance of race. Ironically, considering its origins, the colorblind ideology has done more to thwart the integrationist ideal than to promote it. Ignoring or even downplaying the significance of race in a system that discriminated against a group of people based on its race for hundreds of years – a system that left that group in a politically, economically, and socially disadvantaged state – threatens affirmative action plans and efforts.

Verdun, *supra* note 75, at 13 (citations omitted).

265. See CURRENT, *supra* note 4, at 894.



become part of the more general aim of the members of the various communities of color as well as the general American society, interest in reparations and the meaning behind it will be futile, lost in conflicting goals. Indeed, there are differences, particularly within the African American community, that must be addressed and resolved before progress in the African American reparations movement can be made.

## V. LARGER COMMUNITY OF COLOR

A final issue of the African American reparations movement that reveals an underlying root of racism in America involves the general "minority" community, or community of color. As some "minority" groups have been repaired and others, particularly African Americans, are seeking reparations, the present quest for African American reparations has resurfaced unresolved tensions within the larger community of color.

### A. *Dissolving the Black-White Paradigm Toward Inclusion*

One unresolved tension in the "minority" community is the traditional binary, Black-white notion of race in the United States.<sup>266</sup> One authority described the binary national dialogue on race as "a monolithic . . . construction encompassing only one definition of dialogue in which whites have knowledge of the effects of white racial supremacy equal to people of color; in which all people of color share the same vocabulary of racial discourse . . . ."<sup>267</sup> While Blacks and whites were juxtaposed in traditional notions, what has resulted is the more alarming internal divide and tension within the "minority" community – "Members of all these 'intermediate groups' have been allowed to put a visible distance between themselves and black Americans."<sup>268</sup>

While the Black-white paradigm has arguably had the advantage of focusing racial politics on the United States' most recognized racial issue in its relationship with African Americans, thus benefiting all "minorities," the Black-white paradigm has marginalized the shared experiences of other "minorities" as a result, limiting the scope of issues relevant to race discourse in the United States.<sup>269</sup> A growing corpus of academic discussion on interracial politics has focused on the need to expand the traditional notion of a binary, Black-white racial paradigm.<sup>270</sup>

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266. See Natapoff, *supra* note 157, at 1059-60.

267. *Race as Resistance*, *supra* note 181, at 497.

268. HACKER, *supra* note 143, at 16.

269. See Juan F. Perea, *The Black/White Binary Paradigm of Race: The "Normal Science" of American Racial Thought*, 85 CAL. L. REV. 1213, 1254 (1997).

270. See, e.g., *Race as Resistance*, *supra* note 181, at 506-08; Iijima, *supra* note 121, at 415; Natapoff, *supra* note 157, at 1062-63; Perea, *supra* note 269, at 1224-26.

Important efforts have been made to bridge this divide. Jesse Jackson established his Rainbow Coalition during his presidential campaigns to reinforce the need for the various disenfranchised groups, including race and ethnic groups, to unify in an effort to ensure the hearing of their concerns.<sup>271</sup> Regarding the relationship between African Americans and Latinos, Bill Piatt, Dean of St. Mary's School of Law and one of only seven Latino deans in the country,<sup>272</sup> stated, "The challenge facing African Americans and Latinos, for their own prosperity and for that of America, will be to maximize the areas of mutual cooperation and minimize supposed, perceived, or even real differences."<sup>273</sup>

The World War II actions by the U.S. government leading to Japanese American internment and the granting of Japanese American reparations in response has highlighted the experiences of racism by non-Black people of color, in this case Japanese Americans, and the need for demarginalization of race-related experiences of Asian Americans.<sup>274</sup> This recognition has added to the expansion of the race dialogue in this country and a movement away from a binary paradigm to a more modern multi-tiered paradigm.

#### B. *Danger of Multi-Tiering*

However, along with this important expansion away from the Black-white paradigm, Japanese American reparations have also revealed the danger of the multi-tiering of race in America, of which the "minority" community must be aware and cautious. Apart from the already-discussed dilution of minority concerns through the inclusion of whites as potential victims to be protected,<sup>275</sup> in adding multiple components to the structure of race in America, levels or stratifications are created as opposed to a multiracial-white paradigm.<sup>276</sup> This perpetuates the already existing divide, though in a different form, by creating a new tiering effect where whites are on the upper level, Latinos, Asian Americans,<sup>277</sup> and other "racialized"<sup>278</sup> groups on the middle tier, and African Americans

271. See COLTON, *supra* note 40, at 12-16.

272. See generally RICHARD A. WHITE, *Association of American Law Schools Statistical Report on Law School Faculty and Candidates for Law Faculty Positions 1998-99* (visited Mar. 25, 2000) <<http://www.aals.org/statistics/rpt9T1B.html>>.

273. BILL PIATT, *BLACK AND BROWN IN AMERICA* 3 (1997).

274. See, e.g., Iijima, *supra* note 121, at 389-90; *Race as Resistance*, *supra* note 181, at 497; Perea, *supra* note 269, at 1224.

275. See discussion *infra* Section III.

276. See Iijima, *supra* note 121, at 412 (stating that a more explicitly racial hierarchy exists instead of a binary racial system).

277. See *id.*

278. See Perea, *supra* note 269, at 1220.

on the bottom level.<sup>279</sup> And, while non-Black minorities are no longer marginalized, the danger is that the tiering will divide non-Black minorities and African Americans, pitting them against each other and diluting common issues and potential for coalition.<sup>280</sup>

This is especially dangerous for Asian Americans, who have been used as a "buffer" between whites and other subordinated groups. In this hierarchical structure between different minorities, the African American is not directly judged against white society, but is measured against a "model minority" Asian American. African Americans thus are "monitored" by the Asian American minority against the backdrop of both groups' subordination to the "invisible majority" of whites and their racial privilege. . . . It would be a supreme irony if the effects of moving beyond the black/white paradigm by Asian Pacific Americans and other peoples of color were that the African American struggles for equality became beleaguered on multiple fronts rather than just one.<sup>281</sup>

The reaction by many of the African American community to Japanese American reparations has revealed the perceived danger of multi-tiering, raising a lot of hard questions, with, as expected, answers not always

279. See Iijima, *supra* note 121, at 412.

280. One authority stated,

The carrot of political reward for political accommodation is a particular temptation for Asian Americans, for Asian Americans find themselves in a peculiar place in the developing racial hierarchy. If Asian Americans accept their model minority role, it no doubt will come with the "reward" of higher racial status. As one John O. Calmore has explicitly predicted: "I do believe, however, that dominant America will attempt to situate Asians, Pacific Islanders, and Latinos squarely within its efforts to determine who will be 'white' in the twenty-first century." As such, in the search for more sophisticated paradigms to understand and dismantle all forms of racial subordination, it is imperative not to confuse the subtlety of the various paradigms with necessity to focus the primary attack upon the overall operation of white supremacy.

Chris K. Iijima, *Political Accommodation and the Ideology of the "Model Minority": Building a Bridge to White Minority Rule in the 21st Century*, 7 S. CAL. INT'L DISC. L.J. 1, 26 (1998) (citations omitted) [hereinafter *Political Accommodation*].

281. *Era of We-Construction*, *supra* note 156, at 75-77 (citations omitted). "[T]he 'model minority' stereo-type conveyed a number of silent messages which in turn conveyed the notion that if other minorities were the same as Japanese Americans and had overcome hardship without Government aid, they would be 'rewarded' as well". Iijima, *supra* note 121, at 392-93 (citations omitted). "In essence, what Americans were being told by Congress to celebrate, by the giving of redress to Japanese Americans, was that patriotism - the kind of patriotism that does not resist injustice - gets rewarded." *Id.* at 395 (citations omitted).

forthcoming.<sup>282</sup> As one authority stated, “[a]fter some introspection, I guiltily discovered that my sentiments were related to a very dark, brooding feeling that I had fought long and hard to conquer – inferiority. A feeling that took first root in the soil of ‘Why them and not me?’”<sup>283</sup>

Movement away from the traditional binary paradigm is important and urgent. But, as another author noted, “while progressive scholars and activists agree that the black/white paradigm must be dismantled to make room for more sophisticated and nuance models, the focus on the effects of white supremacist ideology must remain at the core of the analysis.”<sup>284</sup>

### C. *Perpetuation of Racism*

While Japanese reparations engenders issues within the “minority” community, the real problem is its result in perpetuating the larger racism. First, it creates the selectivity of enforcement of reparations principles by whites toward certain minorities, with the ultimate effect of continuing discrimination against African Americans.<sup>285</sup> Second, an illusion of general racial harmony is created as one community of color is repaired and is nationally recognized as repaired, although the negative racial sentiments and power structure generating the original injustice remains intact.<sup>286</sup>

Japanese Americans have the opportunity through their struggle with internment and their subsequent accomplishment of reparations to not only demarginalize their concerns but to also prevent the dangers of multi-level racial tiering and the perpetuation of racism.<sup>287</sup> As one author noted, “Japanese Americans should not allow ourselves to be placed in the position of accepting reparations at the same price that we were asked to pay when we were incarcerated in the first place – accommoda-

282. See Verdun, *supra* note 75, at 659 (discussing how reparations to Japanese Americans sends another message to African Americans that they are at the bottom of society’s ladder).

283. See *id.* at 647.

284. *Era of We-Construction*, *supra* note 156, at 69. “Because we are all infected by the racial stereotyping of the larger society, it is imperative that people of color identify with each other’s past and present so that we may identify our future as shared.” *E.g.*, *Race as Resistance*, *supra* note 181, at 509.

285. See generally 136 CONG. REC. E3606-01 (daily ed. Oct. 27, 1990) (statement by Rev. Marvin A. McMickle). “African-Americans do not begrudge the compensation or the apology to those Japanese-Americans. African-Americans do resent the apparent selective enforcement of the principle of compensation for past injustices.” *Id.*

286. See Iijima, *supra* note 121, at 390. “Since reparations do[es] not change the ‘fundamental realities of power,’ . . . [Japanese American reparations] may become a means by which ‘illusions of change’ are fostered, thereby perpetuating the political structures that gave rise to the original injuries.” *Id.*

287. See *id.* at 393-94.

tion of governmental racial injustice. Aside from its collateral pernicious effects, it places us back at our original humiliation."<sup>288</sup>

Divisiveness is often a strategy used to weaken. It has been used in war and in other situations requiring the strategy, and it was one of the tools used by slave traders and slave owners who broke up Black families or groups too tightly knit. In South Africa, "the racial tiering under apartheid not only codified the white minority's supremacy, it also divided the opposition to it by people of color."<sup>289</sup>

Similar racial tiering issues face the U.S. and, particularly, its communities of color. How these communities deal with this issue will determine much of the future of race relations in this country, how future race issues are addressed, and the potential for continuing reparations for present or future communities facing race-based injuries. Regarding the Asian American community and its recent reparations, one author stated, "Asian Pacific Americans are at a crossroads in terms of where they will stand in the coming era of race relations; they will either be used to solidify the control of white supremacy or stand as a force against it."<sup>290</sup>

## VI. CONCLUSION

I have used the matter of reparations to deliberate on the more fundamental issue of the source of continuing racial tensions and problems that exist in this country. Frankly, the discussion's context could have been any subject where race is a factor. We can learn a lot when we listen to opinions and watch reactions. But, when we delve deeper and dissect the notions and realities behind those opinions and reactions, and when we dissect even further after that, penetrating the array of veils behind which we as individuals and as a society hide, it is then that we discover the source of what underlies persisting racial problems and unsurface much of what we have often denied. This type of examination takes effort, self-criticism, and courage. But, America is at a point where it can either work to heal its disunity with people of color, particularly African Americans, or allow this separate wound to fester while other progress bypasses this issue.

Some might argue, it happened, deal with it. Others might even focus on the people of color who have made it despite tremendous obstacles,

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288. *Id.* at 410.

289. *Id.* at 419. "[R]acial conflict is not primarily rooted in how we as individuals see ourselves with respect to race. It is rooted in how groups have been pitted against one another. The resolution of conflict between races can be resolved only when we understand how the ideology of white supremacy has been internalized by all people - particularly people of color." *Era of We-Construction*, *supra* note 156, at 75.

290. Iijima, *supra* note 121, at 425.

while criticizing those “bad seeds” that cause illusions of problems for the whole. Still, others might argue that race is no different from any other obstacle or “different” immutable characteristic that people have to “deal with.” While these arguments have their place and validity, any form of harmful discrimination is unjust, and when there exists a grave and identifiable injustice invoked on a group of people, solely because of their race, for a period of hundreds of years with a variety of effects of that injustice felt even today, a healing process must occur, even before true progress can be made and completed. Many have “dealt with” racism and discrimination and many have looked oppression in the face with anger and/or motivation and resulting success.<sup>291</sup> And, indeed, many are left behind, some moving forward more slowly and some even moving backwards.<sup>292</sup> But, many members of a variety of racial and ethnic groups struggle with racism, tension, misunderstandings, misperceptions, distrust, and anger, discovering that the crucial problem for America is how she copes with the existence of difference. Instead of celebrating difference, she undermines it by promoting a dominant ideal, undermining any detraction from that ideal, hiding past wrongdoing, and ignoring efforts of absorption.

When a gap is created, our nation cannot simply remove the legal barriers. There must be efforts to close that gap and then deal with the lasting and interpersonal effects – in Black and white communities and communities of color – resulting from the creation and maintenance of that gap.<sup>293</sup> We owe it to our children to reduce or eliminate the corpus of what they will have to “deal with,” and even more importantly to resist any digression. We owe it to our children to encourage them to be good people and do better, and if they are angry, to channel that anger to improving and unifying their community – both immediate, national, and world. It is discouraging to see that many of the acts of racism in this country are being committed by young people, saying and doing what their parents and parents’ parents said and did. Some have changed, but many have not. Those who have not changed, and arguably even those who have changed but have been inactive and ineffective in affecting out-

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291. See generally *A COMMON DESTINY*, *supra* note 19, at 168 (discussing the new opportunities created by the Civil Rights Movement and the reaction to racism).

292. See generally *id.*

293. Randall Robinson asserts:

If Bell is right that African Americans will not be compensated for the massive wrongs and social injuries inflicted upon them by their government, during and after slavery, then there is no chance that America can solve its racial problems – if solving these problems means, as I believe it must, closing the yawning economic gap between blacks and whites in this country.

ROBINSON, *supra* note 185, at 204.

ward change (people of color and White Americans alike), have played a part in delaying meaningful progress.

Nonetheless, as the saying goes, the future is not ours, we simply borrow it from our children. Even though I was supposed to be a beneficiary of the Civil Rights Movement and have received some but not complete benefit, as I learned in Boy Scouts, I plan on leaving the world better than I found it.

Indeed, African American reparations will continue to be discussed and debated. Reparations will also be a critical issue and effort for the larger diaspora in the new century.<sup>294</sup> But, as Tony Hall responded to reaction to his official apology legislation, "Before we get to reparations. . . we've got a lot more to talk about."<sup>295</sup>

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294. See Levitt, *supra* note 124, at 3.

295. Merida, *supra* note 117, at C1.

